INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
1. Introduction	3
2. The beer industry	4
3. The merging companies	5
4. The Wisconsin area	6
5. The three-State area	9
6. The decision of the district court	10
The questions are substantial	11
Conclusion	28
Appendix A (opinion of the district court)	1a
Appendix B (findings and conclusions of the district court)	41a
Appendix C (judgment)	75a

CITATIONS

Cases:

American Crystal Sugar v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, affirmed, 259 F. 2d 524	20
Brown Shoe Co. v. *United States*, 370 U.S. 294	14, 19, 20, 23, 24
Crown Zellerbach Corp. v. *Federal Trade Commission*, 296 F. 2d 800, certiorari denied, 370 U.S. 937	20
Tampa Electric Co. v. *Nashville Co.*, 365 U.S. 320	23
United States v. *Alcoa*, 377 U.S. 271	16

Cases—Continued

	Page
United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576	20
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651	20
United States v. *Philadelphia National Bank*, 374 U.S. 321	16, 20, 22, 23, 24

Statutes and regulations:

Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, § 7	2, 3, 10, 12, 14, 15, 17, 19, 22, 28
Internal Revenue Code of 1954, § 5051, as amended by § 201 of the Excise Technical Changes Act of 1959, P.L. 85-859, 72 Stat. 1333 (26 U.S.C. (1958 ed., Supp. V) 5051)	5
Treasury Regs. on Beer, § 245. 113 (26 CFR 245.113)	5

Miscellaneous:

Forbes, November 15, 1964, p. 31	14
Fortune, October 1964, p. 225	14

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–40a) is reported at 233 F. Supp. 475. Its findings of fact and conclusions of law are reproduced in Appendix B, *infra*, pp. 41a–74a. An earlier phase of the litigation is reported at 183 F. Supp. 220.

JURISDICTION

The final judgment of the district court was entered on October 13, 1964 (Appendix C, *infra*, pp. 75a–76a). The notice of appeal was filed on December 11, 1964. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Con-*

tinental Can Co., 378 U.S. 441; *United States* v. *duPont & Co.*, 353 U.S. 586.

QUESTIONS PRESENTED

The ultimate question presented is whether the government's evidence established prima facie that the acquisition of Blatz Brewing Company by Pabst Brewing Company violated Section 7 of the Clayton Act. That question, in turn, involves the following subsidiary questions:

1. Whether, in considering the impact upon competition of a merger which eliminated a substantial competitor, the court erred in disregarding a marked industry trend toward concentration on the ground that it had not been shown to have resulted from prior mergers rather than from natural economic forces.

2. Whether the district court erred in holding that the only relevant market was the national market, and in refusing to accept shares of sales relating to Wisconsin and adjoining areas as more accurately reflecting the anticompetitive consequences of the merger.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in

any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

1. INTRODUCTION

On July 30, 1958, Pabst Brewing Company ("Pabst") acquired from Schenley Industries, Inc. the assets and business of Blatz Brewing Company ("Blatz") for $11,000,000 in cash, $3,500,000 in debentures, 200,000 shares of Pabst common stock and purchase warrants for an additional 350,000 shares of such stock (Fdg. 3).[1]

On October 1, 1959, the government filed a complaint charging that the acquisition violated Section 7 of the Clayton Act, because its effect may be substantially to lessen competition or tend to create a monopoly in the production and sale of beer in the United States, and in two geographic submarkets: the State of Wisconsin, and the three-State area of Wisconsin, Illinois and Michigan. The issues framed by the pleadings and by agreement of the parties were (1) whether the acquisition had the alleged anti-competitive effects in any of the suggested geographic

[1] Blatz had been a wholly-owned subsidiary of Schenley Industries, Inc. Subsequent to the acquisition, the name of this subsidiary was changed to Val Corporation (Fdg. 2). Val Corporation and Schenley Industries, Inc., were joined and retained in the action as defendants for purposes of relief. See *United States* v. *Pabst Brewing Company*, 183 F. Supp. 220.

markets, and (2) whether either Wisconsin or the three-State area was a relevant section of the country.[2]

The government's proof rested on documentary evidence.[3] At the close of the government's case, the district court granted Pabst's motion to dismiss under Rule 41(b), F.R. Civ. P., on the ground that upon the facts and the law the government had shown no right to relief.

2. The Beer Industry

Ever since the end of prohibition in 1933, the beer industry has shown a marked trend toward concentration, with the largest brewers controlling a progressively increasing share of the market. In 1934, there were 708 brewing companies in the United States. This number declined steadily to 206 in 1957 and 162 in 1961.[4] During the same period, consumption more than doubled, rising from about 41 million barrels in 1935 to about 84 million barrels in 1957. By 1961, consumption had increased by roughly another 5 million barrels (Fdg. 44). Thus, from 1934 to 1961, about 77 percent of the brewing companies, or better than 3 out of every 4, had disappeared from the market, while consumption had more than doubled.

Concurrently, there was a sharp rise in the share of the market held by the leading brewers. The top

---

[2] Pabst also raised a "failing company" defense, alleging that it acquired Blatz to avoid the consequences of its own declining sales and increasing losses. The court, however, did not reach this issue.

[3] Except for brief excerpts from depositions and correspondence, the evidence was entirely statistical in character.

[4] Figures for 1957–1961 are included in Fdg. 47; earlier figures are computed from GX 216–236.

25 companies, which in 1942 accounted for 42.2 percent of sales, increased their share to 68.99 percent in 1957 and 76.96 percent in 1961 (GX 210). None of the other 137 companies in the industry accounted for more than one percent of sales and together they accounted for only 23.04 percent (JX 44).

3. The Merging Companies

In 1957, the last full year prior to the acquisition, Pabst ranked tenth in sales of beer in the United States with 3.02 percent (more than 2½ million barrels) of the market.[5] Blatz ranked eighteenth with 1.47 percent (almost 1¼ million barrels). Pabst emerged from the acquisition as the nation's fifth largest brewing company (the four leaders having market percentages ranging from 4.72 percent to 7.25 percent). By 1961, the last year for which figures are in the record, Pabst was the third ranking seller nationally, accounting for 5.83 percent of sales (more than 5 million barrels). The first and second leading sellers that year accounted respectively for 9.55 and 6.49 percent of total sales (Fdg. 45, JX 32, 44).

At the time of the acquisition (as today) Pabst owned and operated four breweries: the largest in Milwaukee, Wisconsin, and the others in Peoria Heights, Illinois, Newark, New Jersey, and Los Angeles, California. Although Pabst beer was sold throughout the country, the three leading States for

[5] One barrel is the equivalent of 31 gallons. See § 5051 of the Internal Revenue Code of 1954, as amended by § 201, Excise Tax Technical Changes Act of 1959, P.L. 85–859, 72 Stat. 1333 (26 U.S.C. (1958 ed., Supp. V) 5051); § 245.113, Treasury Regulations on Beer (26 CFR 245.113).

its sales during the nine-year period preceding the merger (1949–1957) were those in which it had breweries—California, Illinois and Wisconsin (JX 47–55)—while New York, across the river from Pabst's Newark brewery, ranked fourth. Pabst's sales in these four States averaged about 50 percent of its total national sales (JX 47–55). Its sales in Wisconsin ranged between 7 to 13 percent of its total sales (computed from Fdgs. 24, 25; JX 47–55).

The only brewery owned by Blatz was located in Milwaukee, Wisconsin; its operations were totally discontinued in February 1959 after the merger and the plant was placed on a "shut down" status. Thereafter, Pabst sold Blatz brand beer but brewed it at Pabst plants (Fdg. 13). Although prior to the acquisition Blatz beer was sold in most States (Fdg. 14), a substantial segment of its sales was concentrated in the area surrounding its brewery in Milwaukee. In the period 1949–1957, from 31 to 46 percent of its sales were made in Wisconsin, more than in any other State (computed from Fdgs. 24, 25; JX 47–55), and from 55 to 73 percent were made in the contiguous three-State area of Wisconsin, Illinois, and Michigan (JX 47–55).

4. The Wisconsin Area

Since the repeal of prohibition in 1933, Wisconsin has consistently ranked among the three leading States in the production of beer; since 1946, it has never ranked lower than second (Fdg. 18; JX 22–31). In the period 1953–1961, it annually produced between 11 million and 12 million barrels; *i.e.*, from

11 percent to 13 percent of the national total (Fdg. 18, JX 22–31). Wisconsin had the largest surplus of beer production of any State; it perennially produced between three and four times as much as it consumed (JX 17–21, 26–31).

In consumption of beer, Wisconsin had the highest per capita average of any State (App. A, pp. 9a, 21a). Since 1948, it has consistently ranked ninth among the States in total consumption, annually accounting for about 3 million barrels (3.55 to 3.75 percent of the national total) (JX 16–21). In the three years preceding the merger, from 77 to 81 percent of the beer sold in Wisconsin was purchased from companies operating breweries within the State (computed from JX 19, JX 60–68, GX 257).[6]

The high rate of attrition experienced by brewers, taking the beer industry in the nation as a whole, was also observable in Wisconsin. In the period 1955–1961, the number of companies selling beer in Wisconsin declined from 77 to 54—30 percent—and the number of brewing plants operated within the State fell 21 percent from 43 to 33 (Fdg. 22; JX 60–78, GX 213). During the same period, Wisconsin's consumption rose by approximately 10 percent (from 3 to 3.3 million barrels) (Fdg. 19; JX 19–21). Meanwhile, largely as a result of the Pabst-Blatz merger itself, the share of the market held by the leading sellers substantially increased.

[6] Of the remaining beer sold in Wisconsin, Hamm Brewing Company accounted for about half (JX 60, 63, 66). It has a plant in St. Paul, Minnesota, just across the Wisconsin line (GX 257).

In 1957, the last full year prior to the acquisition, the top four firms each had approximately the same share of Wisconsin sales. Blatz was the leading seller with 12.81 percent, and Pabst ranked fourth with 11.14 percent (Fdg. 23, GX 186, JX 66). Their combined share gave Pabst control of 24 percent of the Wisconsin market, almost twice that of the nearest rival (GX 186, JX 66). By 1961, the combined share had increased to nearly 27.5 percent, more than 2.25 times that of the nearest rival (GX 190, JX 78).

Prior to the acquisition in 1957, the leading seller in Wisconsin held 12.81 percent of the market; the two leading sellers, 24.96 percent; and the top three, 36.60 percent. Giving effect to the acquisition, Pabst would account for 23.95 percent (moving from fourth to first); and the two leading companies would account for 36.10 percent, while the top three would account for 47.74 percent (GX 186). Thus, the increase in concentration by the leading firm would be 87 percent; by the two leading firms almost 45 percent; while the top three would achieve an increase in concentration of over 30 percent.[7]

[7] The trend toward further concentration continued after the acquisition. The following table shows the shares of the leading sellers in 1957, on a projected basis, as compared with 1961 (GX 186, 190):

	1957	1961	Percentage increase in 1961 over 1957
Top	23.95	27.41	14.4
Top 2	36.10	39.38	9.1
Top 3	47.74	50.26	5.2
Top 4	53.55	58.62	9.5
Top 5	57.41	66.79	15.4
Top 6	61.91	72.51	17.1

As indicated above, Wisconsin was "home territory" for both merging companies and accounted for a substantial part of their business.

5. The Three-State Area

Wisconsin and the adjoining States of Illinois and Michigan, accounted in 1957 for more than 14 million barrels, or about 16.5 percent, of all beer sold in the country (JX 19). This area also witnessed a decline in the number of selling companies and the concurrent rise in the proportion of the sales made by the leading brewers. In 1957, 104 firms sold in the area and eight of them accounted for 59 percent of the total sales (GX 204). Four years later, in 1961, there were only 86 companies selling in these States and the share held by the eight leaders had risen to 68 percent (GX 208). This decline in the number of sellers occurred notwithstanding a slight increase in the total volume of sales (JX 92–100).

From 1949 to 1957 (the last full year prior to the acquisition), between 55 and 73 percent of Blatz's total sales and about 30 percent of Pabst's sales were made in the three-State area (JX 47–55). In 1957, Blatz was the sixth leading seller with 5.84 percent of the sales, and Pabst ranked seventh with 5.48 percent. In 1958, the year of the merger, Blatz ranked fourth with 7.70 percent and Pabst seventh with 4.98 percent (GX 204–205). Together they had 11.32 percent of the sales in 1957 (about the same share as the leading seller in the area) and 12.68 percent in 1958 (2 percent more than the leader) (*ibid.*). By 1961, Pabst's

share had increased to 15.07 percent, about 50 percent more than its nearest rival (GX 208).

6. The Decision of the District Court

The district court held that neither Wisconsin nor the three-State area is a "section of the country" within the meaning of Section 7 of the Clayton Act. In holding that Wisconsin is not a relevant market (App. A., *infra*, pp. 8a–22a), the court stated, *inter alia*, that the amount of beer consumed in that State—3.66 percent of the nation's total—was not large enough to make it a commercially significant market; that the high degree of success attained by the merging companies in Wisconsin did not necessarily reflect "the intensity of competition between them" which the merger ended; that beer was freely imported into and exported out of Wisconsin; that evidence of heavy production in Wisconsin, both by the merging companies and others, was without significance, since "there is no evidence * * * that competition in the beer industry is in any manner localized or affected by the location of a brewery" (Fdg. 30); and, in general, that there was no factor which set Wisconsin apart from other States and justified treating it as a distinct geographic submarket.

In holding that the three-State area is not "a section of the country" (App. A, *infra*, pp. 22a–24a), the district court did not consider whether that area's 16½ percent of nationwide sales was sufficiently large to make it an economically significant market. With respect to the government's contention that the bulk of the merging companies' sales, and hence the most in-

tense competition between them, took place in the three-State area, the court held (App. A, p. 24a):

> * * * in this case where the companies involved concededly competed nationally, the plaintiff, in order to satisfy its burden of proving that the three state area is a relevant geographic market, must demonstrate something beyond the fact that isolation of that area from the national market would result in percentages favorable to its position. It must first demonstrate that under the "commercial realities" of the beer industry, Illinois, Michigan and Wisconsin is a relevant market area. * * *

The court went on to appraise the effects of the merger in the only market it considered relevant—the continental United States—and ruled that the government had not proved that the merger was likely to lessen competition substantially. After noting that Pabst's share of that market after the acquisition was not large enough *per se* to permit the inference of probable anticompetitive effects, the court held that it could give no weight to the evidence of a trend toward concentration in the industry, since there was no showing that this development was the result of prior mergers rather than of "normal competitive forces" (App. A, p. 32a).

THE QUESTIONS ARE SUBSTANTIAL

The court below has approved a merger combining the assets and market power of two major producers of beer in an industry characterized by steadily increasing concentration. Judged by national sales the merger enabled the tenth ranking brewer, Pabst, with

3.02 percent of the market to add the 1.47 percent share of Blatz, thus to become the fifth largest brewer with 4.49 percent of all national sales, and to become—three years later—the third ranking brewer with 5.83 percent of national sales. The full significance of these figures and of the merger from the standpoint of Section 7 cannot be appreciated, however, without due regard for two additional circumstances:

First, the acquisition accelerates a sharp trend towards the concentration of economic power in the beer industry with small or regional brewers giving way to dominant national concerns.

Second, since the sales of beer by Pabst and Blatz were naturally largest in areas best served by their breweries and since both had breweries in Milwaukee, the actual loss to competition in that section of the country was much greater than revealed by figures for sales throughout the nation as a whole. Blatz had the largest sales in Wisconsin of any brewer, with 12.81 percent. Pabst ranked fourth with 11.14 percent. The merger combined the two, giving Pabst 24 percent, which was more than twice the share of any other concern. These figures are not mere happenstance. Wisconsin and the adjoining States of Illinois and Michigan are the three populous States best served by both Blatz and Pabst breweries. Between 55 and 73 percent of Blatz's sales and 30 percent of all Pabst sales were made in those States. The combined figures for sales in Wisconsin, Illinois and Michigan show that the merger brought together the sixth and seventh ranking sellers, each with be-

tween five and six percent of this three-State market, forming a combine that soon became the largest seller of beer in the three States measured as a whole.

The court below held both circumstances irrelevant, the first because the trend towards concentration was not proved to be the result of mergers and the second because the only appropriate market for measuring the effect of the merger was nationwide. Both rulings, we submit, were erroneous. Both raise important questions in the administration of the antitrust laws. Their resolution not only will affect past and impending mergers in the brewing industry but will set standards of wider application.

1. It can hardly be denied that a steady trend towards concentration is one of the dominant facts of the brewing industry. The trend has continued unabated for nearly thirty years. In 1934, there were 708 brewing companies in the United States. Although the consumption of beer more than doubled in the 27-year period which followed (increasing from 41 million barrels in 1934, to 84 million barrels in 1957, to 89 million in 1961), the number of brewing companies declined drastically from 708 in 1934, to 206 in 1957, to 162 in 1961. In 1961, there were less than one-fourth as many brewers as there had been 27 years earlier. Meanwhile, the share of the market held by the few largest companies steadily increased. The top 25 concerns, which in 1942 accounted for 42 percent of the industry's sales, recorded 69 percent in 1957 and 77 percent in 1961. Of the remaining 137 companies selling in the continental United States, none

accounted for more than one percent of sales. A comparable trend prevailed among the top 10 firms, which held 33 percent of the market in 1948, 45 percent in 1957, and 53 percent in 1961.[8]

We submit that in an industry which has experienced such a dramatic, long-sustained, and still-continuing trend toward concentration, the acquisition of any substantial competitor by one of the leading companies falls within the statutory ban, at least in the absence of any justification.[9] In 1957, the year preceding the merger, Pabst and Blatz ranked tenth and eighteenth, respectively, in national sales, their respective shares being 3.02 and 1.47 percent. Pabst emerged from the acquisition as the nation's fifth largest brewing company, with 4.49 percent of the national sales. By 1961, Pabst had risen to third place with 5.83 percent, a share exceeded only by Anheuser-Busch's 9.55 percent, and Schlitz's 6.49 percent (JX 44). While the percentage shares may appear small when considered in isolation, they take on larger significance in the context of growing concentration. The purpose of Section 7, as this Court has stressed, is to curb tendencies toward concentration in their incipiency. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 346. It would be surprising indeed if a statute so designed did not prohibit so sub-

[8] The share of the top ten has been placed at 57 percent in 1963. *Fortune*, October 1964, p. 226. A recent commentary in a financial publication on the brewing industry forecasts that "[t]he U.S. will end up with perhaps a dozen beer companies." *Forbes*, November 15, 1964, p. 31.

[9] Since the complaint was dismissed at the close of the government's evidence, the only question here is whether the government made a *prima facie* case.

stantial an acquisition in an industry which has been moving rapidly along the path of increasing centralization.

The court below gave no weight whatever to the evidence of a trend toward concentration, holding, in effect, that such evidence is relevant only when the trend is shown to have resulted from prior mergers rather than from normal competitive forces with which Congress had no wish to interfere. The court's analysis, we submit, confuses two wholly different points. It is quite true that Section 7 was not intended to "interfere" with "normal competitive forces" or to bar increases in concentration not attributable to mergers. But here a merger *is* involved—an acquisition which artificially accentuates, to a significant degree, the trend of the industry in the direction of oligopoly. The only question here, therefore, is whether the probable effect upon competition of the merger artificially eliminating a substantial competitor is to be judged against the background of the actual economic conditions in the industry or as if they did not exist. Judge Tehan's ruling means, in substance, that the probable effect of a merger upon competition must be found to be the same whether it occurs in an industry characterized by a large and constant number of small firms with frequent new entrants to the market or in an industry in which there is a marked trend towards oligopoly. Such a rule would not only be artificial; it would also disregard the policy of Section 7. The disappearance of numerous small, local companies, whether it be

through acquisitions or through inability to compete effectively with their large regional and national rivals, underscores the public importance of barring combines destroying the independence of the strong and viable companies which remain. If the existing trend toward concentration in the beer industry continues and the ranks of the small brewers are still further depleted, the only hope of avoiding an oligopolistic market structure dominated by a handful of giant concerns lies in the preservation of vigorous, medium-sized competitors such as Blatz. Were there no such trend, the probable adverse effect of the same merger upon competition in the brewery industry would be markedly less.

Our position upon this issue is supported by two analogous rulings by this Court. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n. 42, the Court stated that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." The point was re-affirmed in *United States* v. *Alcoa*, 377 U.S. 271, 279, where the Court laid stress upon the oligopolistic structure of the aluminum-conductor market even though that structure was not primarily the consequence of prior acquisitions. In neither case did the Court inquire into the causes of the concentration. By the same token, we submit, if concentration is rapidly increasing, the importance of preventing even slight additional increases is "correspondingly great," and the causes of the existing condition are equally irrelevant.

So far as we know, this is the first case in which a court has held that, in appraising the impact of a merger upon competition, the existence of a strong trend toward concentration may be disregarded unless it stems from a prior history of mergers. That holding, we believe, is basically contrary to the purposes of the Clayton Act and should be reversed by this Court.

2. Quite apart from the considerations noted above, an independent ground for reversal is that the court misinterprets the statute's concern with the adverse effects of competition *in any section* of the country. The government's evidence shows that in at least one section of the country the effect of the merger upon competition would be much more severe than anything suggested by the national figures. In Wisconsin the effect of the combination was to give Pabst 24 percent of all sales, a share which it soon increased to 27.5 percent. In the three States of Wisconsin, Illinois and Michigan—Pabst emerged with 11.32 percent and shortly forged ahead to command 15 percent of the tri-State sales—about 50 percent more than its nearest rival (GX 208).

The court below gave no weight to this evidence because it concluded that neither Wisconsin nor the tri-State area was an appropriate market in which to test the effects of the Pabst-Blatz merger; in its view, since many brewers sell beer nationwide, the market is national and nationwide sales should be used to test the effect of the merger upon competition. The ruling raises a novel and very important question in the administration of Section 7.

Evidence that a number of rival producers sell their products in competition in all parts of the country and that some of the products consumed in any region may be shipped in from outside the region is not enough to establish that there are no relevant geographical submarkets. Such nationwide sales and shipments are found in two utterly dissimilar situations. A market may be national in the sense that all sellers are seeking to sell to any potential buyers and all buyers to buy from any seller, unaffected by location, as might be true of locomotives or large commercial aircraft. That would be a true national market like a national stock or grain exchange. With many other products, however, especially consumer goods, the sellers are not equally able and willing to sell in every area; the buyers have established local preferences and limited range; and sometimes prices will vary from place to place. In such an industry the extent of competition between any two companies and the consequences of their merger will vary greatly from place to place because there is not a true national market.

The marketing of beer furnishes a prime illustration of the latter situation. No one would contend that the effect upon competition of a merger between a nationwide distributor and a large regional or local seller of beer could fairly be appraised by looking exclusively to their shares of all beer sold in the United States. There would be a marked effect upon local or regional competition, which would not be disclosed by the figures for national sales. Figures for national

sales would show only a statistical average effect upon competition.

The same is obviously true of a merger between two companies both of which have nationwide sales but which sell large quantities of beer in some sections and very little in others. In Colorado and Texas, for example, the effect of the Pabst-Blatz merger upon competition may be minimal since neither concern sells much beer in those areas. Especially in Wisconsin, but also throughout the three-State area of Wisconsin, Illinois and Michigan, the effect will be much greater because both companies sold large portions of the beer consumed in those areas. The consumer in Wisconsin, where the merger gives one concern command of 25 percent of the sales, derives no benefit from the fact that the merger has scant adverse effect upon competition in Texas or Colorado. As in the case of the acquisition of a regional beer, figures for national sales, taken alone, show little more than an average effect upon competition.

Section 7 is concerned with more than the nationwide effects of a merger or the average national injury to competition. It proscribes any merger having sufficient anticompetitive consequences—

> in any line of commerce *in any section* of the country.

Thus, as the Chief Justice pointed out in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 337 n. 65, "[i]f two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small

share of each company's business would not immunize the merger in those markets in which competition might be adversely affected." "The proper question to be asked * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate" (*United States* v. *Philadelphia Bank*, 374 U.S. 321, 357). Consequently, in the present case, the court below should not have concerned itself solely with a national average but with those areas where in fact the competitive overlap was clear and the adverse effect upon competition keen. The statutory standard is whether "in any section of the country" the merger might tend substantially to lessen competition. A single State, a group of States, or even a single metropolitan area may qualify as a "section" of the country for that purpose.[10]

In the present case the government offered compelling proof that the Pabst-Blatz merger will have markedly more serious anticompetitive consequences in Wisconsin and the tri-State region—areas con-

[10] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (a four-county metropolitan area); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (a single State and a section of the State); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336–337 (single metropolitan areas); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (C.A. 9), certiorari denied, 370 U.S. 937 (a three-State area); *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576 (S.D. N.Y.) (a four-State area and two single State areas); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D. N.Y.), affirmed, 259 F. 2d 524 (C.A. 2) (a ten-State area).

veniently served by the Milwaukee and Peoria Heights breweries—than any average effect spread over the country as a whole."[11] The record makes it clear that the breweries in the region are the principal sources of supply for, and the major competitive factors in, the territory surrounding them. Nearly 80 percent of the beer consumed in Wisconsin in the period 1955–1957 came from Milwaukee breweries (computed from JX 19, JX 60, 63, 66; GX 257); another 10 percent came from the Hamm brewery in St. Paul, Minnesota, just across the State line (JX 60, 63, 66; GX 257). Of the 20 top sellers of beer in Wisconsin, 17 operated Milwaukee breweries and two—Hamm and Drewry's of Chicago—had their breweries in adjoining States (*ibid*). It is obvious, too, that the sectional market near his brewery is especially important to a brewer. Blatz sells 41 percent of its beer in Wisconsin. Pabst sells 44 percent of its total output in States where Pabst breweries are located (California, Illinois and Wisconsin) and another 6 percent in New York, which is directly across the Hudson River from Pabst's Newark brewery. Since Pabst's California and Newark breweries admittedly make only local or regional sales, Pabst must sell no less than about 20 percent of the output of its Milwaukee and Peoria Heights breweries in Wisconsin (JX 66; GX 110). Of all the beer consumed in Wis-

[11] In this respect the government challenges the district court's finding that "There is no evidence in the record that competition in the beer industry is in any manner localized * * * or affected by the location of the brewery or that the place of production affects sales or the extent of the market area" (Fdg. 30).

consin Blatz sold 12.81 percent and Pabst 11.14 percent, so that the acquisition gave Pabst just under 25 percent of the market.

The figures for the tri-State area (Wisconsin, Illinois, and Michigan) show that the Wisconsin figures result from, and reflect, economic forces rather than the caprices of chance. Distributors and consumers in the tri-State area purchased 77 percent of their supplies from concerns operating local breweries. Blatz sold 70 percent of its beer there. Pabst made 30 percent of its total sales there and about 45 percent of the output of its Milwaukee and Peoria Heights plants (JX 91, GX 110).[12] The merger put 11 percent of the area sales in the control of Pabst.

Since Wisconsin is an amply large and important enough area to qualify as a section of the country for the purposes of Section 7,[13] the *Philadelphia Bank* case, *supra*, makes it plain that the merger is invalid if it "may tend substantially to lessen competition" in that area. The foregoing statistics showing the sources and Pabst and Blatz shares of the sales of beer in Wisconsin not only demonstrate that the effects of the merger will be felt there more severely than in other States but they give a fair indication of the severity of the anticompetitive consequences—just under 25 percent of the present sales will be concentrated in the hands of a large national brewer and the independence of a major Wisconsin competitor will be eliminated.

[12] The latter figure is calculated by subtracting the output of the New Jersey and California breweries, which do not ship into the midwest, from the total Pabst sales.

[13] Cases cited n. 10, *supra*, p. 20.

The court below, in rejecting Wisconsin as a meaningful section of the country in which to test the merger, relied heavily on the fact that beer was freely imported into and exported out of Wisconsin. It is true that in appraising the market shares in Wisconsin one must recognize that Wisconsin is not an economic island. For Pabst to acquire 25 percent of all Wisconsin sales carries somewhat different consequences for the Wisconsin consumer than an acquisition of 25 percent of all national sales would carry for the national consumers. The supply for Wisconsin is a good deal more elastic since national brewers and even concerns theretofore confined to other localities could divert beer to Wisconsin, given a stimulus, more readily than the national supply could be increased. But even if the Wisconsin area is not a perfect separate market, neither is it so much a part of a simple, homogenous national market as to justify disregarding the special importance of Pabst and Blatz in Wisconsin and relying exclusively on national statistics. One must use the statistics available and appraise them as best he can.

The decision below gains no support from such precedents as *Tampa Electric Co.* v. *Nashville Co.*, 365 U.S. 320; *Brown Shoe Co.* v. *United States*, 370 U.S. 294; and *United States* v. *Philadelphia National Bank*, 374 U.S. 321. As the Chief Justice pointed out in the *Brown Shoe* case (370 U.S. at 336), "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." In the *Tampa Electric* case the Court looked to the area from which the buyer could be

served and in which the producers who could serve it conducted their operations, because that was the area of competition which, as a practical matter, would be affected by the requirements contract. In the *Philadelphia Bank* case, as pointed out above, the Court held that it is proper to look to the area in which the effects of the merger will be "direct and immediate" even though the merging firms do business elsewhere, and *Brown Shoe* held that a city with a population exceeding 10,000 and its immediately contiguous area was a relevant submarket even though there is some competition among stores in different communities in the same "standard metropolitan area." Manifestly, nothing in this approach requires ignoring the practicalities of the special sectional competition in the sale of beer in favor of a purely statistical national average.

Judged by the pragmatic tests used in prior decisions the area centered upon Wisconsin had the characteristics of a special submarket from the viewpoint of both sellers and buyers. Wisconsin was a "home territory" for both companies, accounted for a substantial segment of their total sales, and was the scene of their most intensive competition. Both companies had breweries there. Blatz's only brewery was located in Milwaukee, and in the five-year period preceding the merger (from 1953 to 1957 inclusive), about 40 percent of its total national sales were made in the State of Wisconsin (Fdg. 24; JX 51–55). It was in Milwaukee, too, that Pabst operated the largest of its four breweries; and Wisconsin accounted for over 10 percent of all of Pabt's sales—an amount

exceeded only in California and Illinois where two of its other breweries were situated—and roughly 20 percent of the output of its Milwaukee and Peoria Heights breweries (JX 66; GX 110). The significance of the fact that the merger gave Pabst control of two local breweries is attested by the fact that nearly 80 percent of all beer consumed in Wisconsin in the period 1955–1957 came from breweries located within the State. More than half the remainder came from a St. Paul brewery just across the State line. Seventeen of the top twenty sellers of beer in Wisconsin operated breweries within the State.[14]

The record does not show whether the predominance of local beers is due to price differences based upon transportation costs, to the good will and loyalty of Wisconsin consumers toward their local product, to the existence of established business relationships between Wisconsin brewers and distributors, or to some other factor or combination of factors. Whatever the reason, the fact is that Wisconsin was an extraordinarily self-sufficient area of beer supply. In 1957, the State was the home of 38 breweries (GX 213), ranked second in the production of beer, and produced more than three and a half times as much beer as it consumed, a ratio unequaled in any other State and even remotely approached in only one.[15] No one can doubt that an out-of-State brewing company con-

[14] The remaining three were Hamm's of St. Paul, Anheuser-Busch of St. Louis, and Drewrys of Chicago (JX 60, 63, 66).

[15] JX 19, 29, 66; GX 213. The only State even remotely comparable to Wisconsin as a beer surplus area was Missouri, which in 1957 produced 6,622,896 barrels (JX 29) and consumed 2,209,373 barrels (JX 19).

sidering expansion to new markets would have judged the conditions of competition in Wisconsin as distinct from those prevailing elsewhere, and the prospects of successful full-fledged entry as markedly less favorable. The demonstrated preference of Wisconsin consumers for locally produced beers and the domination of the market by Wisconsin producers as a group were important "commercial realities" which set the State apart.

We recognize, of course, that State boundaries do not necessarily have intrinsic commercial significance. Contour lines marking differences in competition from the standpoint of the Pabst-Blatz merger probably would not correspond exactly with the political boundaries. Nonetheless, State statistics often provide the most convenient and workable means for measuring the effect of a merger in a submarket, once the general area has been selected upon economic grounds. A State is a well defined and independently significant geographic entity and thus not the product of gerrymandering for purposes of a particular litigation. Economic data is usually essential to measure competition and the States are areas for which relevant market statistics are most likely to be available—particularly in the case of a product, such as beer, which is subject to extensive State taxation and regulation. Businesses frequently organize their operations on a State-by-State basis, and the record shows this to be true in the present case. Pabst adopted a separate pricing policy in each State, and while in some cases a uniform price prevailed throughout a multi-State area, it was more common for the price to vary even

as between neighboring States (GX 115). Significantly, moreover, the State of Wisconsin was singled out for special treatment; after the merger, Pabst sold its newly acquired Blatz product at a higher price in that State than in any other, presumably in recognition of its extraordinary popularity there. Thus, the acquiring company itself considered each State as a separate submarket for pricing purposes and recognized Wisconsin as a particularly distinctive sales area. Surely, the government's evidence at least established a prima facie case.

Even if the Wisconsin figures taken alone were thought to give a somewhat inaccurate picture because of the number of national brewers presumably willing to increase shipments to Wisconsin, we submit that reliance on the figure for nationwide sales would give a totally misleading impression of the effect of the merger upon competition in the area dominated by Wisconsin breweries. The composite picture, even when viewed most favorably to appellees, is one of a merger bringing together a leading nationwide firm and one of its substantial competitors in an industry in which there is a continuing sharp trend towards the elimination of competitors and the concentration of economic power, with severe sectional anticompetitive consequences. Using nationwide sales as a guide to the average effect upon competition the merger brought together tenth and eighteenth ranking firms with 3.02 percent and 1.47 percent of the market, forming the nation's fifth largest brewing company with 4.49 percent of the market. Both of the merging firms had breweries in Milwaukee and their com-

bined sales in Wisconsin were 24 percent of the whole. Taking Wisconsin, Illinois and Michigan together, Pabst and Blatz combined made 11.32 percent of the sales in the area—a share that soon exceeded 15 percent. Even if it be assumed that the effects of the merger upon sectional competition are considerably less adverse than the Wisconsin and tri-State figures might suggest, nevertheless, they considerably exceed the range for permissible mergers in an industry of increasingly concentrated economic power, and the composite picture is more than enough, in the absence of contrary evidence, to establish the violations of Section 7.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
FRANK I. GOODMAN,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JULY 1965.

APPENDIX A

United States District Court, Eastern District of Wisconsin

No. 59-C-215

UNITED STATES OF AMERICA, PLAINTIFF

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION, DEFENDANTS

OPINION

On or about July 30, 1958, Pabst Brewing Company acquired the assets and business of Blatz Brewing Company, a wholly owned subsidiary of Schenley Industries, Inc., for approximately $11,000,000 in cash, $3,500,000 in debentures, 200,000 shares of Pabst common capital stock and a stock purchase warrant for an additional 350,000 shares of such stock. On October 1, 1959, the United States of America filed a complaint in this court pursuant to § 15 of the Clayton Act (Title 15 U.S.C. § 25) alleging that the effect of that acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States, the State of Wisconsin, and the three state area of Wisconsin, Illinois, and Michigan in violation of § 7 of the Clayton Act (Title 15 U.S.C. § 18) and asking in part that the court adjudge the acquisition

to be illegal and require Pabst to divest itself of the business and assets of Blatz.[1]

Prior to the trial, an intensive pre-trial program produced considerable agreement between the parties. It was agreed that the line of commerce involved herein is the beer industry, meaning the production, sale and distribution of beer and that the continental United States is a relevant geographic market for purposes of this case. Jurisdiction and venue were admitted by Pabst, as was the fact that prior to the acquisition both Pabst aand Blatz sold beer in interstate commerce, which Pabst continues to do. Issue remained, however, as to whether the State of Wisconsin and the three state area of Wisconsin, Illinois, and Michigan are also appropriate sections of the country within which the probable effect of the acquisition is to be judged, Pabst claiming, contrary to the plaintiff's allegations, that the only relevant market area is the continental United States. There was also no meeting of the minds on the probable effect of the acquisition, Pabst denying that the effect thereof may be substantially to lessen competition in the areas advanced by the plaintiff as relevant and alleging that the purpose thereof was to avoid the consequences of Pabst's declining sales and increasing losses[2] and to preserve and promote competition and that the effect thereof was to preserve and promote competition. The plaintiff therefore faced at the

[1] The defendant, Val Corporation, formerly Blatz Brewing Company, and the defendant, Schenley Industries, Inc., have been joined and retained in this action solely for purposes of relief. (See *United States* v. *Pabst Brewing Company* (E.D. Wis., 1960) 183 F. Supp. 220.)

[2] The plaintiff moved to strike this "failing enterprise" defense, contending that it was available only when the acquired, not the acquiring, entity was failing. This motion was denied. (See order of March 31, 1961.)

trial the burden of proving, as it alleged, that Wisconsin and the three state area of Wisconsin, Illinois and Michigan are sections of the country within which the probable effect of the acquisition of Blatz by Pabst is to be examined and that the probable effect of that acquisition may be substantially to lessen competition or to tend to create a monopoly in the beer industry in either the continental United States or, if proved to be relevant market areas, in the State of Wisconsin or the three state area.

Pre-Trial Occurrences

After issue was joined, a series of pre-trial conferences was held to prepare this case for trial on the issue of whether § 7 had been violated. It was determined that a hearing on the type of relief to be afforded, if any, would await this court's decision on the substantive issue. It was further determined that prior to trial the plaintiff would identify the persons it had interviewed in connection with this case and those it intended to call as witnesses and would identify all documentary evidence upon which it would rely and that Pabst would make similar revelations to the plaintiff. Pursuant to the court's pre-trial directions, the plaintiff listed seventy-one persons whom it proposed to call as witnesses at the trial.

When this case was originally scheduled for trial on October 14, 1963, by order of May 7, 1963, it was estimated that the trial would last two months, such estimate being based in part on the plaintiff's expression of intention to call seventy-one witnesses. Thereafter, the trial was rescheduled twice, finally for January 27, 1964, and since the plaintiff still indicated that it would call seventy-one witnesses, no change was made in the trial estimate.

On January 3, 1964, the plaintiff and Pabst each

781-374—65——3

moved for an order granting permission to issue subpoenaes to witnesses residing more than 100 miles from Milwaukee and outside of this district. In the plaintiff's motion, its counsel stated:

> "All such witnesses are believed by the plaintiff to have evidence material to the issues of this cause, and that the testimony of said witnesses is necessary to establish the alleged violations of the charges and allegations contained in the complaint filed in the above case." (sic)

On January 13, 1964, the plaintiff filed its pre-trial brief reiterating its belief in the importance and essentiality of the testimony of its witnesses as follows:

> "In the course of proving the facts about the 'industry context' required by the *Brown Shoe* opinion, the Government will call brewer witnesses to testify about the actual competitive situation in the beer industry. This is an invaluable and time honored mode of evidence in antitrust cases where the effect on competition is an issue. See for instance, *United States* v. *Philadelphia National Bank et al., supra,* at pages 367–369. These brewers deserve the close attention of the court not only because of their intimate knowledge of actual competitive conditions, but also because they represent companies which were the particular object the Anti-Merger Act sought to protect. These witnesses will show that the brewing industry is still, to some extent at least, an industry where control remains in the local community in the independent small company. Some of these witnesses will also testify as to the probable effect of changes in Blatz prices. This is perfectly proper under Section 7 which by its very nature looks to the future as already pointed out by the word 'may.' The Court is called on in

deciding these cases to predict the future and to do so must receive all the help it can get from industry representatives. The best source lies in industry experts, men long versed in the problems of breweries. Some of the Government's brewery witnesses in Wisconsin will testify that if Pabst ever cuts either the Pabst or Blatz prices to the level of their own, they would immediately be forced out of business. This is not subject to the objection that it is speculative because it comes from experts and will be received after a proper foundation is laid. We will prove that in other areas other breweries have been adversely affected by the lowering of Pabst or Blatz prices to the level of their own." (Pages 27–28)

* * * * *

"The testimony of distributors presented in this case will be generally similar to that approved by the Court of Appeals in *Crown Zellerbach Corporation* v. *Federal Trade Commission*, 296 F. 2d 800 (C.A. 9, 1961) *cert. den.* 370 U.S. 937 (1962). That case involved the merger of two paper producers which resulted in the cutting off of an important source of supply to independent paper jobbers. The court at pages 828–830 discussed at length the testimony of jobbers about how their businesses had been injured by the merger and upheld the Federal Trade Commission's finding of lessening competition." (Page 32)

Also on January 13, 1964, a final conference was held at the request of counsel at which the plaintiff again affirmed its intention to call witnesses and both the plaintiff and Pabst agreed to furnish opposing counsel with a list of witnesses to be called each week, and the order of their expected appearance, by Wednesday of the preceding week. An order respecting that agreement was submitted by the parties, and was received and signed by the court on January 20, 1964.

On January 23, 1964, two court days before the trial was to commence, the court received a letter from counsel for the plaintiff, dated January 22, 1964, the day the plaintiff was to furnish its list of witnesses for the first week of trial, which letter stated:

> "Pursuant to the final pre-trial order, the list of plaintiff's witnesses for the week beginning January 27, 1964 is to be furnished to defense counsel on January 22, 1964. As was indicated to some extent at the last pre-trial conference, attorneys for the Government have been assiduously attempting to reduce the number of witnesses and thus narrow the issues.
>
> "It is now the decision of the Government that this case well lends itself to trial as a purely documentary case with no live witnesses.
>
> "The purpose of this letter is to inform the Court and defense counsel of this decision and the resulting sharp curtailment of the length of trial required for the Government's case. We now consider it probable that the Government will rest within two days commencing on January 27, 1964."

No explanation was volunteered by the plaintiff for this drastic change of position regarding the desirability and necessity of testimony of many witnesses to establish its case and only when counsel was pressed for an explanation by the court on April 30, 1964 was any attempt at explanation made. With respect to this matter, we understand the plaintiff's position to be that it decided to call no witnesses at the trial because the state of the law had been clarified recently to the extent that statistics satisfied the plaintiff's burden of proof. We must here note that the only significant recent clarifications in the merger field prior to January 22, 1964, when the plaintiff decided to call no witnesses, were *Brown Shoe Co. Inc.* v. *United States* (1962) 370 U.S. 294 and *United States* v. *Philadelphia National Bank, et al* (1963)

374 U.S. 321. Both of these cases were decided long before January 22, 1964 and the familiarity of plaintiff's counsel with them prior to that date is revealed in the plaintiff's pre-trial brief.

THE TRIAL

The trial began on January 27, 1964, at 10:45 A.M., with opening statements. At approximately 2:30 P.M., the plaintiff began presenting its case, that is, offering exhibits and reading portions of depositions. It rested at about 3:45 P.M. the following day, after offering some 260 exhibits, whereupon the defendant Pabst filed a motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Briefs with respect to that motion were filed, a hearing was held on April 30, 1964, proposed findings and comments thereon were filed, and the court is now prepared to render its decision.

PABST AND BLATZ

When it acquired Blatz in 1958, Pabst already operated four brewery plants, one, the largest, in Milwaukee, Wisconsin, one in Peoria Heights, Illinois, one in Newark, New Jersey, and one in Los Angeles, California. Blatz operated but one plant, in Milwaukee, Wisconsin, which plant was placed on a shut-down status in 1959, with Blatz brand beer being brewed thereafter at the four Pabst plants.

In 1957, the last full year prior to the acquisition, Pabst ranked tenth in sales of beer in the United States with 3.02% of the market and in 1958, its rank was eleventh, with 2.67% of the market. Blatz was the eighteenth largest selling brewery in the United States in 1957 with 1.47% of the market and the thirteenth largest selling brewery in 1958 with 2.04% of the market. In 1957, Pabst beer, under various brand names was sold throughout the continental

United States and Blatz beer was sold in 38 states and in the District of Columbia. In earlier years Blatz beer had been sold throughout the continental United States.

The Plaintiff Has Not Satisfied Its Burden of Proving That Wisconsin or the Three State Area Is a Relevant Geographic Market

Both the plaintiff and Pabst have cited with conviction the following language from the *Brown Shoe* case, in support of their respective positions as to the relevant market area:

> "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. 294, at Pages 336–337.

Each maintains strenuously that a proper application of this standard must result in a determination that its position with respect to the relevant geographic market or markets is correct.

Since the parties are agreed that the continental United States is a relevant geographic market, we shall not in this section of our opinion discuss the facts pertaining to that area. We shall discuss separately the pertinent facts regarding the disputed areas of Wisconsin and the three state area of Wisconsin, Illinois and Michigan and our reasons for determining that it has not been proved that either of those areas is a relevant geographic market within which the probable effect of the acquisition of Blatz by Pabst should be tested.[3]

[3] Some variances exist in the exhibits with respect to the statistics hereinafter presented, but it does not appear that the variances are material.

WISCONSIN

Since the repeal of prohibition in 1933, Wisconsin has consistently ranked among the top three states in the production of beer. Statistics presented by the plaintiff on taxpaid withdrawals [4] from 1933 through 1961 and on production from 1935 through 1961 reveal this fact and reveal that in 1957, Wisconsin ranked second in production and taxpaid withdrawals of beer with over 11,000,000 barrels, in 1958 it ranked first with over 11,000,000 barrels, in 1959 and 1960 it ranked second with over 10,000,000 barrels and in 1961, with taxpaid withdrawals over 10,000,000 and production over 11,000,000 barrels, it again ranked second. From 1957 through 1961, total national taxpaid withdrawals grew from over 84,200,000 barrels to almost 89,000,000, Wisconsin's percentage thereof ranging from 11.45% (1960) to 13.08% (1958), and total national production grew from over 89,300,000 barrels to almost 95,000,000 barrels, Wisconsin's percentage thereof ranging from 11.34% (1960) to 13.18% (1958).

In beer consumption in the United States, Wisconsin ranked either eighth, ninth or tenth for each of the years 1934 through 1961, and its ranking for 1957 through 1961 was ninth.[5] During each of those latter years, over 83,700,000 barrels of beer were consumed nationally, Wisconsin consuming between 3.66% and 3.75% thereof.

---

[4] "Taxpaid withdrawals" means the output of breweries on which the federal excise tax of $9.00 per barrel is paid.

[5] In per capita consumption of malt beverages, Wisconsin's ranking for those latter years was first. In 1961, 39% of the beer sold in Wisconsin, or ten gallons per person was draught beer, and the national average of draught beer sold was 19% of the beer sold, or 2.8 gallons per person. Per capita consumption of draught beer in Wisconsin in that year was higher than in any other state reporting that statistic.

From 1935 through 1961, the production of beer in Wisconsin far exceeded Wisconsin consumption of beer. For example, during the years 1957 through 1961, the number of barrels produced and consumed in Wisconsin were:

Year	Barrels produced	Barrels consumed
1957	11,735,362	3,066,673
1958	11,868,224	3,112,965
1959	10,737,424	3,198,468
1960	10,589,589	3,267,348
1961	11,198,894	3,303,154

And the Wisconsin consumer did not limit himself to Wisconsin brewed beer, but drank freely of beers brewed by out of state brewers. It is ovious, therefore, that the great bulk of Wisconsin's production of beer was consumed outside of that state.

During 1955, beer was sold in Wisconsin by 77 breweries. The number of breweries operated in that state in that year was 43. During 1956, beer was sold in Wisconsin by 74 breweries and 43 breweries were operated in that state. During 1957, beer was sold in Wisconsin by 69 breweries and 38 breweries were operated in that state. During 1958, beer was sold in Wisconsin by 68 or 69 breweries and 38 breweries were operated in that state. During 1959, beer was sold in Wisconsin by 60 breweries and 38 breweries were operated in that state. During 1960, beer was sold in Wisconsin by 58 breweries and 33 breweries were operated in that state. During 1961, beer was sold in Wisconsin by 54 breweries and 33 breweries were operated in that state.

Both before and after the acquisition, Pabst and Blatz found the Wisconsin consumer appreciative of their products. Their rankings in sales and percentages of total beer sales in Wisconsin from 1955 through 1961 were as follows:

	Pabst		Blatz		Pabst-Blatz	
	Rank	Percent of Wisconsin sales	Rank	Percent of Wisconsin sales	Rank	Percent of Wisconsin sales
1955	3d	10.51	1st	14.01		
1956	4th	10.86	1st	12.72		
1957	4th	11.14	1st	12.81		
1958	4th	10.73	1st	12.99		
1959					1st	24.80
1960					1st	26.14
1961					1st	27.41

The total number of barrels sold of Pabst and Blatz nationally and the number sold in Wisconsin for the years 1949 through 1961 were as follows:

	Pabst		Blatz	
	National	Wisconsin	National	Wisconsin
1949	4,336,378	302,556	1,545,622	491,626
1950	3,763,395	295,203	1,650,071	574,302
1951	3,901,571	271,682	1,665,281	567,726
1952	4,076,816	301,914	1,551,523	607,589
1953	3,925,757	283,347	989,288	430,285
1954	3,263,033	304,036	923,583	427,609
1955	3,129,452	324,506	907,836	432,510
1956	3,017,552	333,539	937,241	389,410
1957	2,548,452	340,376	1,239,334	388,678
1958	2,254,001	333,244	1,717,489	403,437
(After acquisition)				
1959	2,060,775	374,764	2,133,545	416,322
1960	1,952,130	429,402	2,426,440	424,327
1961	2,067,346	475,490	2,624,716	429,772

Throughout those years, more Blatz beer was sold in Wisconsin than in any other state, except in the years 1958 through 1961, when Wisconsin sales of Blatz were exceeded by Blatz sales in Michigan. In none of those years except 1960, was Wisconsin the largest state market for Pabst.

In the years 1955 through 1960 the following amounts were spent by Pabst for advertising and promoting of Pabst beer nationally and in Wisconsin:

	National advertising	Wisconsin advertising
1955	$7,261,270	$436,427
1956	8,450,316	557,722
1957	8,640,837	787,924
1958	6,309,002	558,751
1959	5,422,782	647,468
1960	5,724,267	779,472

The following amounts were spent by Pabst in 1959 and 1960 for advertising and promoting of Blatz beer:

	National advertising	Wisconsin advertising
1959	$4,185,697	$986,817
1960	5,113,295	1,001,020

After the acquisition, the price charged distributors in Wisconsin for "Blatz Pilsner" brand beer on packages of twenty-four 12 oz. returnable bottles, F.O.B. brewery, was generally higher than that charged elsewhere.

The plaintiff contends that Wisconsin is a relevant market for purposes of this case because (a) prior to the acquisition, the most intense competition between Pabst and Blatz existed in Wisconsin, therefore the impact of the acquisition would be most severe in that state, (b) Wisconsin's standing in the beer industry makes it an appreciable segment of the market, (c) each state is a separate relevant market, since each state has its own regulations affecting the beer industry, (d) Blatz prices are kept higher in Wisconsin than in any other state, and (e) Wisconsin's high per capita consumption of beer, high consumption of draught beer and large number of small, locally owned [6] breweries make it a unique market. In support of its position that Wisconsin is a geographic

[6] There is no evidence in the record that any small brewery located in Wisconsin is locally owned.

submarket within which the effects of the acquisition may be tested it cites the *Brown Shoe* case, *supra,* the *Philadelphia Bank* case, *supra, United States* v. *Bethlehem Steel Corporation* and *The Youngstown Sheet and Tube Company* (S.D., N.Y., 1958) 168 F. Supp. 576, *Crown Zellerbach Corporation* v. *Federal Trade Commission* (C.A. 9, 1961) 296 F. 2d 800, *United States* v. *El Paso Natural Gas Co.,* (1964) 376 U.S. 651, and *United States* v. *First National Bank & Trust Co. of Lexington* (1964) 376 U.S. 665. While we agree that in a proper case the effects of a merger or acquisition should be tested in a geographic submarket, we do not believe that the plaintiff has introduced evidence sufficient to prove that the State of Wisconsin is a geographic submarket which corresponds to the commercial realities of the beer industry or is economically significant. In our opinion, all of the cases relied upon by the plaintiff on this issue involved fact situations substantially different from the facts involved in this case.

In both the *Philadelphia Bank* case, where the four-county Philadelphia metropolitan area was held to be the proper section of the country, in which to appraise the merger between the second and third largest banks in that area, and the *Lexington Bank* case[7] where a one county area was held to be the section of the country within which to test the effect of a consolidation of the first and fourth largest banks in that area, the line of commerce discussed by the Supreme Court was commercial banking. The records in both cases established that competition was localized by the factor of inconvenience. As the Supreme Court stated in the *Philadelphia Bank* case,

---

[7] This case involved Sections 1 and 2 of the Sherman Act and not Section 7 of the Clayton Act.

> "In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 169 (C.A. 3rd Cir. 1953). The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." 374 U.S. 321, at Page 358.

The beer industry is not a service industry and there is no evidence in this record that competition in the beer industry is in any manner localized or affected by location of a brewery. Absent such evidence, neither Bank case is authority here for the proposition that Wisconsin is a relevant geographic market.

The *El Paso Gas* case, cited by the defendant on oral argument, is of no assistance to us. It is not clear that there was even any issue as to whether California was a "section of the country."

The *Brown Shoe* case involved a merger between two companies each of which both manufactured and retailed shoes. With respect to the vertical aspect of the merger, the entire nation was held to be the relevant geographic market, (370 U.S. 294, at Page 328) as it was with respect to the horizontal aspect of the merger on the manufacturing level, the Supreme Court stating:

> "The parties do not dispute the findings of the District Court that the Nation as a whole is the relevant geographic market for measuring the anticompetitive effects of the merger viewed vertically *or of the horizontal merger of Brown's and Kinney's manufacturing facilities. As to the retail level, however, they disagree.*" 370 U.S. 294, at Page 337. (Emphasis added.)

The court's subsequent holding and agreement with the district court that the relevant geographic markets in which to analyze the merger were cities with populations exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets related only to the retail level of the merging companies' operations. The record before us does not reveal that Pabst or Blatz competed or were likely to compete at the retail level through controlled outlets in any area prior to the acquisition. Rather, it appears that their sales of beer were made primarily through distributors or wholesalers. The breweries' relationship with these distributors and wholesalers has not been revealed, nor has the relationship of retail outlets to either the breweries or the distributors or wholesalers. Absent any evidence as to retail activities on the part of Pabst or Blatz, *Brown Shoe's* rule that on the retail level the effect of the merger involved could be analyzed in local areas or geographic submarkets is of no aid to the plaintiff.

In the *Crown Zellerbach* case, in which the Court of Appeals for the Ninth Circuit held that relevant market area within which the effects of the acquisition by Crown Zellerbach Corporation of the stock and assets of St. Helens Pulp and Paper Company were to be examined was the three state area of Washington, Oregon and California, the record supported a finding that "the great bulk of the domestic sales, of the papers involved, by Crown and St. Helens" (296 F. 2d 800 at Page 816) were made in that three state area. In 1952, the year before the acquisition, 71.7% of St. Helens' sales of relevant products were in that area and that area was St. Helens' "predominant and outstanding market." (296 F. 2d 800 at Page 817.) The record in this case does not reveal that Wisconsin held a comparable position with re-

spect to either Pabst or Blatz beer sales. In 1957, 340,378 of the 2,548,452 barrels of Pabst sold nationally were sold in Wisconsin, and 388,678 of the 1,239,334 barrels of Blatz sold nationally were sold in Wisconsin. While these Wisconsin sales are respectable, they do not approach the 71.7% found in the *Crown Zellerbach* case to constitute the Pacific coast states the predominant and outstanding St. Helens' market. And apparently the evidence in *Crown Zellerbach* revealed that the Pacific coast states were unique, possessing qualities setting them apart as a separate area.[8] No comparable evidence in this case establishes that Wisconsin is a unique market for beer or is to be treated differently, by reason of any peculiar characteristics, from any other area in which beer is sold.

In the *Bethlehem Steel* case, involving a proposed merger between Bethlehem Steel Corporation and The Youngstown Sheet and Tube Company, the court held that the appropriate relevant markets as to four of the products or lines of commerce involved included, but were not limited to the United States as a whole, a submarket thereof—the northeast quadrant of the United States, a submarket of that submarket—Michigan, Ohio, Pennsylvania and New York, a submarket of that latter submarket—Michigan and Ohio, and two submarkets of the latter submarket—(1) Michigan and (2) Ohio. As to seven other lines of

[8] The court stated in that case:

"Moreover this three-state market is one which, in the language of the Court of Appeals in American Crystal Sugar Co., supra, was subject to common economic forces; it is an area of extraordinarily rapid population growth, with large and growing cities, increasing industrial activities and other growth factors which set it apart from other areas in the west. The availability of alternative water transportation, while little availed of, has operated to furnish peculiarly favorable land carrier rates." (296 F. 2d 800, at Page 817.)

commerce, the appropriate relevant market was held to be the United States as a whole. It appears that the court felt that each of the submarkets mentioned was an appreciable segment of the market within which the merging companies were effective competitors primarily because of the large percentage of total industry shipments and of Bethlehem and Youngstown shipments into those submarkets. We consider it significant that the court stated:

> "Of course, the national market for a product like steel is not the national market which exists for a product like cigarettes." (168 F. Supp. 576 at Page 601.)

Recognizing, we believe, that the market for a product like cigarettes was fairly uniform throughout the nation, in which case the nation as a whole would clearly be the relevant market area, while the demand for steel, and iron and steel industry products, was localized or concentrated in various industrialized pockets of the nation. We consider that the beer market resembles the cigarette market more than the steel market in that the record reveals that the use of beer is nation-wide, its sales are not limited primarily to states having any particular industry and no state or area can be said to be predominant in the sales or consumption of beer. The market for beer, unlike the market for steel, is not concentrated. We note also that in *Bethlehem Steel*, the northeast quadrant of the United States had 83% of national steel consumption, the four-state area of Michigan, Ohio, New York and Pennsylvania received 48.4% of the total industry shipments of common finished steel products, Michigan and Ohio received 31.3% of those shipments, Michigan received 18.2% of those shipments and Ohio received 13.1% of those shipments. In contrast, as noted previously, Wisconsin

consumed only between 3.66% and 3.75% of the total beer consumed in the nation during the years 1957 through 1961, a rate of consumption which, in our opinion does not set it aside as an area in which the beer market is concentrated.[9]

We find no merit in the plaintiff's contention that Wisconsin is a relevant market area because the most intense competition between Pabst and Blatz before the acquisition existed in Wisconsin. Pabst and Blatz competed throughout the nation as the plaintiff, in claiming that the continental United States is an appropriate section of the country, admits. In 1957, in competing in Wisconsin, they were competing for only 3.66% of the nation's consumption. As to that 3.66% segment, it is true, they realized considerable success, Pabst selling 340,378 of its total national sales of 2,548,452 barrels of beer in Wisconsin and Blatz selling 388,678 of its total national sales of 1,239,334 in Wisconsin and Pabst selling 11.14% and Blatz 12.81% of all beer sold in Wisconsin. We cannot say, however, from the fact that Pabst and Blatz beers found acceptance in Wisconsin, that the most intense competition between them existed in that state. We have no basis in the record for finding that the degree of success attained by

[9] In determining the relevant geographic market for the beer industry, we consider sales data, and not production data, to be controlling. As the Supreme Court stated in *Philadelphia Bank*, quoting *Tampa Electric* v. *Nashville Coal Co.*, 365 U.S. 320, the area of effective competition is the market area in which the seller operates and to which the buyer can practicably turn for supplies. Production figures can, of course, be extremely meaningful where evidence reveals that the production locale affects sales, for example where transportation costs are so high as to limit sales to an area near the place of production, but no evidence in this case establishes that the location of any brewery affects or limits the area in which the seller operates or to which the buyer turns for supplies.

the companies reflected the intensity of the competition between them.[10] And, as we noted before, the percentage of Pabst or Blatz sales in Wisconsin did not approach the percentage of St. Helens' sales in the Pacific coast states in the *Crown Zellerbach* case, cited by the plaintiff on this point.

Neither do we agree with the plaintiff's contention that Wisconsin is a significant market area "because of its important position in the beer industry as a whole." (Page 7, Government's Brief in Opposition to Defendant's Motion To Dismiss.) In support of this contention, the plaintiff has pointed to production data contained in its exhibits and compared some of the production percentages to consumption percentages in the *Bethlehem Steel* case. Unquestionably, Wisconsin produced and exported a substantial amount of beer before at the time of and since the acquisition of Blatz by Pabst and a sizable number of breweries operated in that state. As we stated previously, however, this production data, while interesting, does not define a relevant geographic market where there is no proof that the place of production in any manner affects sales. Absent such proof, the plaintiff's comparison of Wisconsin beer *production* figures with steel *consumption* figures in the *Bethelehem Steel* case is not apt. As we also stated previously, the figures presented relative to consumption of beer in Wisconsin are not such as to render Wisconsin a significant market area.

The plaintiff has also argued that Wisconsin (and incidentally every state) is a separate market area in the beer industry because Wisconsin (and every state)

[10] The figures introduced by the plaintiff as to the amounts spent by Pabst and Blatz for national and Wisconsin advertising can be given little weight particularly since no evidence as to Blatz expenditures prior to the aquisition were offered.

is free to regulate that industry and has, in fact, "enacted a complex system of laws which have the effect of making each state a separate and distinct market for competition in the beer industry." (Page 8, Government's Brief In Opposition To Defendant's Motion To Dismiss.) Exhibits introduced in support of this argument establish that states have enacted laws relative to alcoholic content permissible in beer sold within their boundaries, packaging and labelling of beer, etc., which laws must, of course, be respected. The plaintiff admits that the state regulations are common to all breweries and do not make it impossible to sell beer within different states. The fact that beer is sold throughout the United States reveals that the laws of the various states do not deter competitors. The most that can be said is that all competitors are bound by state regulations, must observe them while engaging in competition, and must and do make appropriate adjustments in their procedures in various states to observe them properly. We do not consider it necessary to discuss the evidence as to state regulations introduced by the plaintiff in detail. The plaintiff has admitted that it has no authority for its position that state regulations create separate market areas and we hold that state regulations, equally burdensome on all competitors, which do not prevent or deter competition, do not perforce render every state, including Wisconsin, a separate market area.

While the plaintiff contends that Pabst has recognized Wisconsin to be a unique market by pricing Blatz beer higher in Wisconsin than elsewhere since the acquisition, during which period more Blatz beer was sold in Wisconsin than in any state except Michigan it has presented proof as to the price of only one type of package and has presented no argument and

cited no authority to convince us that this price factor is of any moment in ascertaining the relevant geographic market.

We have also considered the plaintiff's contention that Wisconsin is a relevant geographic market because it is unique in that its per capita consumption of beer is higher than any other state, its consumption of draught beer is high and "it is the center of the small, locally owned breweries remaining in this country." (Page 13, Government's Brief In Opposition To Defendant's Motion To Dismiss.) We are not satisfied that such uniqueness marks Wisconsin as a separate market area. Despite its high per capita consumption of beer, Wisconsin, with its 3.66% of the nation's consumption of beer in 1957, was not an appreciable segment of the market. And we are not at all certain that per capita consumption statistics relative to a product which, by its very nature, cannot be sold to the population at large, but only to adults, are of any value. They may be of aid in determining consumer characteristics but not in defining a market area. The plaintiff has given no reason for considering draught beer separately in determining a market area. The stipulated line of commerce in this case is the beer industry and we cannot single out or place any reliance on statistics regarding draught beer, a division of the product involved, without sufficient reason. As we have stated previously, the location of production facilities has not been shown to affect the market area. In like manner the location of a number of small competitors in Wisconsin has not been shown to make Wisconsin a relevant geographic market.

We hold that the plaintiff has not shown that Wisconsin as a geographic market corresponds to the commercial realities of the beer industry or is economically significant, nor has it shown that Wisconsin

is an appreciable segment of the market in the beer industry.

THE THREE STATE AREA

After the defendant Pabst filed its motion to dismiss and indicated its intention to press that motion, the court directed the parties to file briefs. Because the plaintiff had the burden of proof with respect to the only contested issues, it was directed to file the opening brief, disclosing to the court and to the defendant how it claimed to have satisfied that burden.[11] In its opening brief, its discussion of the facts relative to its position that the three state area is a section of the country within which the effect of the acquisition of Blatz by Pabst should be examined is limited to the following paragraph at Pages 13 and 14:

> "In regard to the three-State area of Wisconsin, Illinois, and Michigan, in which the Government has also asked the Court to measure the effects of the merger, it is sufficient to point out that its importance rests on the same factors that make Wisconsin a relevant market. By adding the States of Illinois and Michigan to Wisconsin, the Court may see the effects of the merger in a larger, therefore more 'appreciable' segment of the national market. In 1957 Pabst made 30.5 percent of its sales in the area (JX 55), and ranked seventh with 5.48 percent of the market (JS 91). In that year Blatz made 66.7 percent of its sales in the area (JX 55), and ranked sixth with 5.84 percent of the market (JX 91). Forty-two percent of the combined sales of the two companies was made in the area (JX 55), and together they ranked second with 11.32 percent of the market (JX 91)."

[11] Some clarification of the plaintiff's position was necessary since most of the exhibits comprising the plaintiff's case had been introduced into evidence with no explanation whatsoever.

No further discussion on this point is contained in its reply brief, nor did the plaintiff amplify its position on oral argument. It appears therefore that the plaintiff itself relies solely on the revelations in Exhibits 55 and 91 as to percentages of Pabst and Blatz sales in the three state area and Pabst and Blatz shares of the market as satisfying its burden of proof and considers no other facts relevant on this issue.

Exhibit 55 reveals that of the 2,548,452 barrels of beer sold by Pabst in the continental United States in 1957, 361,579 barrels were sold in Illinois, 74,928 barrels were sold in Michigan, and 340,378 barrels were sold in Wisconsin, a total of 776,885 barrels [12] or approximately 30.5% of Pabst's total sales in the continental United States being sold in the three state area. It further reveals that Blatz sold 1,239,334 barrels of beer in 1957, and that 139,707 of those were sold in Illinois, 298,672 in Michigan and 388,678 in Wisconsin, a total of 827,057 barrels,[13] or approximately 66.7% of Blatz's sales in the continental United States, being made in the three state area.

Exhibits 91 and 92 reveal that in 1957, 14,230,609 barrels of beer were sold in the three state area by a total of 104 breweries. Blatz was the sixth largest seller with 5.84% of the market and Pabst ranked seventh with 5.48% of the market.

The plaintiff apparently contends that the bulk of Pabst and Blatz sales occurred in the three state area with the result that the most intense competition between them was in that area, therefore that is a relevant market area. Unquestionably, both Pabst and Blatz were successful in the three state area.

[12] Exhibit 91 shows sales of 779,234 barrels by Pabst in the three state area in 1957.

[13] Exhibit 91 shows sales of 831,527 barrels by Blatz in the three state area in 1957.

However, we find no precedent for permitting the plaintiff to select an area in which the two companies, which competed nationally, realized success and, solely because of that success, designate the area a relevant geographic market. In our opinion, in this case where the companies involved concededly competed nationally, the plaintiff, in order to satisfy its burden of proving that the three state area is a relevant geographic market, must demonstrate something beyond the fact that isolation of that area from the national market would result in percentages favorable to its position. It must first demonstrate that under the "commercial realities" of the beer industry, Illinois, Michigan and Wisconsin is a relevant market area. No such proof is in the record.

The Plaintiff Has Not Satisfied Its Burden of Proving That the Effect of the Acquisition of Blatz by Pabst May Be Substantially To Lessen Competition or To Tend To Create a Monopoly in the Beer Industry in the Continental United States, the Only Relevant Geographic Market

Having held that neither Wisconsin nor the three state area of Wisconsin, Illinois and Michigan is a relevant geographic market, we must now determine whether in the continental United States, the stipulated relevant market area, the effect in the beer industry of the acquisition of Blatz by Pabst may be that prohibited by § 7 of the Clayton Act, which does not prohibit all such acquisitions but only those the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."

The plaintiff has the burden of proving that there is a reasonable probability that the acquisition may have the proscribed effect. In order for the plaintiff to satisfy its burden it must present either evi-

dence sufficient to support a finding that the acquisition, a fait accompli when this action commenced, already had that effect or evidence sufficient to supply a basis for a finding and prediction that a reasonably probable consequence of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the future. As the Supreme Court noted in the *Brown Shoe* case;

> "the very wording of § 7 requires a prognosis of the probable *future* effect of the merger" (370 U.S. 294, at Page 332)

and:

> "It is the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts and the Commission to examine." (370 U.S. 294, at Page 333.)

In our opinion the evidence introduced by the plaintiff does not satisfy its burden.

The plaintiff appears to contend that it has demonstrated that the acquisition may substantially lessen competition or tend to create a monopoly in the continental United Sates by (1) statisical evidence as to the market share controlled by Pabst as a result of the acquisition, (2) statistical evidence showing a trend toward concentration in the brewing industry, and, (3) evidence as to the "vertical effects" of the acquisition on distributors of beer and on maltsters. We shall discuss first the evidence referred to in Points 1 and 2, reserving until later consideration of evidence relating to distributors and maltsters.

In 1934, the first full year of beer production after the repeal of prohibition, there were 714 breweries in the United States. In 1935, the number of breweries increased to a peak of 750 and it thereafter declined so that in 1957 there were 264 breweries and

by 1961 the number of breweries in the United States was 229. Thus, during the period from 1935 through 1961 there was a 69.47% decline in the number of breweries operating in the United States. During that same period in the continental United States there was a fairly steady increase in taxpaid withdrawals of beer from 39,654,720 barrels in 1934 to 84,288,580 barrels in 1957, to 88,976,417 barrels in 1961. Consumption of beer increased fairly steadily from 35,862,145 barrels in 1934 to 83,779,609 barrels in 1957, to 88,485,795 barrels in 1961, and production of beer increased fairly steadily from 47,735,901 barrels in 1935 to 89,382,923 barrels in 1957, to 94,972,948 barrels in 1961.

In its exhibits 32 through 46, the plaintiff has listed the breweries selling beer in the United States for each of the years 1957 through 1961,[14] and the ranking of each brewery and its percentage of sales for those years. In 1957, sales of beer were made in the United States by 206 breweries. Twenty-seven breweries made 1% or more of the sales, three, Anheuser-Busch, Schlitz and Falstaff made over 5% of sales and two, Ballantine and Hamm, sold more than 4%, but less than 5%. Pabst ranked tenth in sales with 3.02% and Blatz ranked eighteenth with 1.47%, a combined total of 4.49%. The top ten breweries in that year had 45.06% of sales and the top twenty-five had 68.99% of sales. In 1958, 191 breweries sold beer in the United States. Twenty-six breweries made 1% or more of the sales, three, Anheuser-Busch, Schlitz and Falstaff made over 5% of sales and three, Ballantine, Carling and Hamm sold more than 4% but

[14] The number of breweries listed differs from the number shown in Exhibits 212 and 213. No explanation of this variance has been offered. Probably Exhibits 212 and 213 refer to brewing premises while Exhibits 32 through 46 to brewing companies.

less than 5%. Pabst ranked eleventh in sales with 2.67% and Blatz ranked thirteenth with 2.04%, a combined total of 4.71%. The top ten breweries in that year had 46.06% of sales and the top twenty-five had 70.71% of sales. In 1959, 177 breweries sold beer in the United States. Twenty-six breweries made 1% or more of the sales, three, Anheuser-Busch, Schlitz and Falstaff, made over 5% of sales and four, Carling, Ballantine, Pabst (with the addition of Blatz) and Hamm, sold more than 4% but less than 5%. Pabst, with its acquisition of Blatz, ranked sixth with 4.79%, slightly more than the combined total of the two companies the preceding year. The top ten breweries had 49.51% of sales and the top twenty-five had 73.44% of sales. In 1960, 171 breweries sold beer in the United States. Twenty-seven breweries made 1% or more of the sales, four, Anheuser-Busch, Schlitz, Falstaff and Carling, made over 5% of sales, and three, Ballantine, Pabst (with the addition of Blatz), and Hamm sold more than 4% but less than 5%. Pabst combined with Blatz ranked sixth with 4.98%. The top ten breweries had 50.75% of sales and the top twenty-five had 74.83% of sales. In 1961, 162 breweries sold beer in the United States. Twenty-five breweries made 1% or more of the sales, six, Anheuser-Busch, Schlitz, Pabst (with the addition of Blatz), Falstaff, Carling and Ballantine, made over 5%, of sales and one, Hamm, sold more than 4% but less than 5%. Pabst combined with Blatz ranked third with 5.83%. This increase in Pabst's rank and market share between 1960 and 1961, the only sizable increase over the combined market share of Pabst and independent Blatz in 1957, has not been connected by the plaintiff in any way with its acquisition of Blatz in 1958. The top ten breweries in 1961 had 52.60% of sales and the top twenty-five had 76.96% of sales.

In 1948, the top ten brewing companies in the United States sold 32.68% of the beer sold in the United States and the top twenty-five sold 49.2%.

MARKET SHARES

It is true, as argued by the plaintiff, that in the *Brown Shoe* case, in discussing the horizontal aspects of the merger involved on the retailing level, the Supreme Court recognized the significance of market shares as a factor in predicting the probable effect of a merger on competition stating:

> "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market." (370 U.S. 294, at Page 343.)

However, it also stated in discussing the vertical aspects of the merger that:

> "* * * an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed. *However, this factor will seldom be determinative.* If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act. And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act. On the other hand, foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition.'

> *"Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor de minimis proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe."* [Emphasis added.] (370 U.S. 294, at Pages 328–329.)

With respect to the horizontal aspects of the merger on the retailing level, the Supreme Court considered many factors in addition to market shares.

In the *Philadelphia Bank* case, the Supreme Court held that the percentage of the market controlled as a result of a merger may be of such size as to raise an inference that the merger may substantially lessen competition, that "With respect to mergers whose size makes them inherently suspect" (374 U.S. 321 at Page 363) proof of market shares alone on the part of the Government would be sufficient to shift to the opposing parties the burden of proving that the merger is not likely to have anticompetitive effects and that proof of control of 30% of the market as a result of a merger was sufficient to raise an inference that the merger would substantially lessen competition.

The plaintiff apparently realizes that the share of the market controlled by Pabst in the continental United States, which we have held to be the only relevant geographic market, as a result of the acquisition of Blatz is not itself of such dimensions as to raise an inference that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly. In presenting its market share argument in its brief, it concentrates on Wisconsin

and to a minor extent on the three state area, and, when it discusses the continental United States, ties this argument in with its second point—that the brewing industry is tending toward concentration, and its third point—the vertical effects of the acquisition. Thus, on Page 18 of the brief in opposition to the motion to dismiss, it argues:

> "In the United States market, Pabst made a phenomenal rise from eleventh place in total sales to third place in three years. Pabst rose from 2,254,001 barrels to 4,194,321 barrels in 1959 and continued upward to 5,192,062 barrels in 1961 and thus more than doubled its sales in that short period of time (JX 35–JX 44, JX 47–JX 59, GX 209).
>
> "Just consider what was happening in this market: The eleventh largest United States brewery bought the eighteenth largest and in a space of three years became the third largest in sales; from 2.67 per cent of that market it almost doubled its market share to become 4.98 per cent. The effect in these areas is sufficient to establish a probable lessening of competition under Section 7, *especially when considered in conjunction with vertical effects, and the general context of the industry. In an industry containing a number of vulnerable small businesses, which were subject to an accelerating trend toward competition,* [*sic*] the Supreme Court, in the *Brown Shoe* case, found illegal a merger which would have given Brown Shoe Co. control of only 4½ per cent of national shoe production,[15] and 7.2 per cent of the nation's shoe stores." [Emphasis added.]

[15] This reference is grossly misleading since in *Brown Shoe* it was held that the merger of Brown's and Kinney's manufacturing facilities with 4% and 0.5% of the market, was economically too insignificant to come within the prohibitions of the Clayton Act.

The "phenomenal rise" to which the plaintiff refers was actually an increase in Pabst's market share from 3.02% in 1957 and 2.67% in 1958 to 4.79% in 1959, an increase which can be almost completely accounted for by the addition of Blatz's market share to that of Pabst. This resultant percentage of the United States market is not in and of itself an "effect * * * sufficient to establish a probable lessening of competition under Section 7." In our opinion, proof that Pabst had a 4.79% of the market after the acquisition in 1959, which percentage had grown to a 5.83% in 1961, is not sufficient to establish that the acquisition is inherently likely to lessen competition under the rule of the *Philadelphia Bank* case, nor that Pabst and Blatz were major competitive factors comparable to the consolidating banks in the *Lexington Bank* case. This is not a case in which the plaintiff can shift to Pabst the burden of proving the absence of probable anticompetitive effects in the continental United States by proof of market shares alone. We must therefore determine whether the additional documents offered by the plaintiff relative to the probable effect of the acquisition, that is, documents which the plaintiff believes prove a trend toward concentration in the brewing industry and a reasonable probability of anticompetitive vertical effects, present evidence sufficient to put the defendant Pabst to its proof.

Trend Toward Concentration

The only proof in the record relating to the plaintiff's position that the brewing industry has experienced a trend toward concentration is statistical evidence establishing that (1) the number of breweries in the United States has decreased, (2) production, consumption and taxpaid withdrawals of beer have increased, and (3) the percentage of the market shared

by the top ten and top twenty-five breweries has increased. This statistical showing absolutely fails to establish a trend toward concentration in the beer industry. In the absence of any showing to the contrary, it must be concluded that all three factors are the result of operation of normal competitive forces, and we do not understand the plaintiff to urge that in enacting § 7 Congress wished to interfere with those forces.

Our interpretation of the authorities cited by the plaintiff, the *Bethlehem Steel* case, the *Brown Shoe* case, and the *Philadelphia Bank* case, is not that Congress, in enacting § 7, was attempting to stifle or immobilize successful competitors or to secure for those who did not wish to compete or for failing competitors—those who could not compete because of inferior products, management, etc.—a place in the market. Rather, it wished to prevent overzealous competitors from enhancing their positions to the detriment of competition by mergers or acquisitions. The type of concentration § 7 was designed to avoid was concentration resulting from mergers and acquisitions, not increases in market shares resulting from superiority of product or services. Judge Weinfeld stated in the *Bethlehem Steel* case in discussing Congressional intent relative to concentration that the objective of Congress was:

> "to limit future increases in the level of economic concentration *resulting from corporate mergers and acquisitions.*" [Emphasis added.] 168 F. Supp. 576 at Page 583.

And at Page 604 of that case, Judge Weinfeld said:

> "A major purpose of section 7 is to ward off the anticompetitive effects of increases 'in the level of economic concentration *resulting from corporate mergers and acquisitions*'. Both the Senate and House Committee Reports empha-

sized the deep concern of the Congress with the continued trend towards concentration of economic power *through mergers and acquisitions.*" [Emphasis added.]

In *Brown Shoe,* the Supreme Court, discussing the trend toward concentration in the shoe industry, spoke not of a mere lessening in the number of competitors but of a history of acquisition by manufacturers of retail outlets, of combinations and of mergers. In a footnote, the Court said:

> "A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry." (370 U.S. 294, at Page 345.)

In *Philadelphia Bank* too, the Supreme Court, speaking of a trend toward concentration in commercial banking, referred to a record showing the disappearance during one decade of 1601 independent banks, 1503 of which disappeared as the result of mergers, and to a prior history of mergers in the Philadelphia area.

The plaintiff herein, upon which rests the burden of proof, however, has shown no "trend toward concentration" in the beer industry, as that term has been used in the authorities upon which it relies. So far as the record discloses, not a single merger or acquisition in the beer industry preceded the acqui-

sition of Blatz by Pabst and the decrease in the number of breweries resulted from the play of natural economic forces. No contrary showing having been made, we must hold that no trend toward concentration has existed in the beer industry.[16]

Vertical Effects of the Acquisition on Maltsters

In Paragraph 17 of its complaint and in a more definite statement with respect thereto, the plaintiff alleges that malt, a primary ingredient in the brewing process, is produced by Pabst for use in its own breweries and in the manufacture of other products, that prior to its acquisition by Pabst, Blatz purchased its malt requirements from outside sources, that prior to the acquisition Pabst's malt capacity exceeded its own needs, that after the acquisition Blatz brand beer contained only Pabst produced malt and no malt purchased from outside sources and that the acquisition harmed independent malt suppliers by cutting off Blatz as a market and harmed independent breweries by depriving them of a potential supply of Pabst produced malt. In its answer Pabst admits that malt is a primary ingredient in the brewing process and is produced by Pabst for use in its own breweries and in the manufacture of other products, and that prior to the acquisition Blatz purchased its malt from suppliers. The plaintiff was put to its proof on the remaining allegations.

The plaintiff's proof consisted of Exhibits 116 and

[16] Of course the acquisition in question could conceivably violate § 7 even if it were the first in the beer industry. However, since the plaintiff has proved no trend toward concentration we cannot, in determining the probable effect of the acquisition, view it against a backdrop of concentration as the plaintiff urges.

117, answers to interrogatories which had been submitted by the plaintiff to Pabst. Exhibit 117 establishes that in 1957 Blatz purchased a total of $2,105,845.05 worth of malt from seven suppliers and in the first seven months of 1958 its malt purchases from eight suppliers amounted to $1,609,037.43. Exhibit 116 establishes that in 1957, Pabst purchased $515,066.78 worth of malt from outside suppliers, in 1958 it purchased $2,277,945.02 worth of malt from outside suppliers and in 1959 it purchased $1,768,779.17 worth of malt from outside suppliers. Some of the malt purchased in 1958 was purchased at the Blatz premises, but none of the malt purchased in 1959 was purchased at the Blatz premises.[17]

Nothing in Exhibits 116 and 117 tends to prove the plaintiff's allegations that Pabst's malt capacity prior to the acquisition exceeded its own needs, or that since the acquisition Blatz brand beer has contained only Pabst produced malt. Neither is there any proof that the acquisition harmed independent breweries by depriving them of a potential source of supply for malt from Pabst's malt producing facilities.[18] The plaintiff appears to recognize these deficiencies in its brief since it directs no argument toward those allegations.

It is true as the plaintiff contends that no malt was purchased from independent maltsters for the Blatz plant in 1959. However, Exhibit 116 reveals that Pabst purchases of malt from independent maltsters for its four breweries in 1959 exceeded by over

[17] As stated previously, the Blatz premises went on a shutdown status in 1959. Brewing at that plant ceased prior to February 20, 1959.

[18] There is no indication that Pabst ever sold malt or had the potential to sell it or, if it was a potential source of supply for independent breweries, that the acquisition of Blatz interfered with that potential.

$1,250,000 its 1957 purchases. Since Blatz brand beer was being brewed in Pabst plants in 1959 it is a fair assumption that Pabst had to increase its purchases of malt to brew Blatz brand beer.

The plaintiff states in its brief that it has clearly demonstrated that the maltsters selling malt to Blatz in the eighteen months prior to the acquisition lost the entire market represented by the Milwaukee-Blatz Brewery and that this loss of over two million dollars of business is a serious matter for them. This argument is a distortion since it ignores the increase in Pabst malt purchases after the acquisition. We do not consider it of any importance that some of the Pabst suppliers of malt were different from those who formerly supplied Blatz and that some of the former Blatz suppliers sold no malt to Pabst in 1959. Pabst purchased from independent suppliers and as far as the record reveals all were free to compete for its business. Just as Blatz prior to the acquisition could have changed suppliers if it desired, so also Pabst was not bound by any dictates of the Clayton Act to purchase only from former suppliers to Blatz.

The record with respect to maltsters reveals only that independent maltsters sold less malt for brewing Pabst and Blatz brand beers in 1959 than in 1957. On this meager record, unsupported by any testimony, we cannot hold that the impact on independent maltsters of the acquisition was significant. And the facts herein are so dissimilar from those in the *Bethlehem Steel* case relied upon by the plaintiff that no discussion thereof is warranted. We need only say that here the acquired company sold no ingredients (malt—rope wire) to third parties and bought back no finished product (beer—wire rope) from third parties.

We have also considered the rather inconsistent

arguments advanced by the plaintiff that (1) suppliers of malt have been adversely affected by the acquisition because Pabst and Blatz, which used to compete in their purchases, no longer compete,[19] and (2) Blatz is now part of an integrated company with a competitive advantage over non-integrated breweries.[20] These arguments are contained in two unenlightening paragraphs at Pages 25 and 26 of the plaintiff's brief in opposition to the motion to dismiss.

As stated before, the only evidence in the record relative to malt is Exhibits 116 and 117, neither of which in any way defines the malt industry or the nature of competition therein or reveals that there is benefit to a brewer in being integrated as to its supply of malt even if integration be shown. These arguments are based on nothing but surmise, and manifest no reasonable probability of anticompetitive effects in either the beer industry—the only line of commerce involved herein—or the malt industry.

Vertical Effects of the Acquisition on Distributors

It is the position of the plaintiff that immediately after its acquisition of Blatz, Pabst established a policy of consolidating Pabst and Blatz distributors and that cancellation of a distributor and the throwing of Pabst and Blatz brands into a consolidated distributorship lessens competition in the sale of beer by depriving the cancelled distributor of his source of supply and by lessening the number of competing distributors, thereby lessening competition

[19] This argument indicates that the plaintiff believes that Pabst's competitive position in purchasing malt has been enhanced.

[20] This argument indicates that the plaintiff believes no malt need be purchased.

among distributors."[21] The plaintiff further argues that a potential lessening of competition between distributors occurred in areas where only one brand was distributed prior to the acquisition and where after the acquisition the existing distributor distributed both brands because, absent the acquisition, another distributorship might have been established.

We know from the record that distributors are important since approximately 80% of Pabst beer was sold through them prior to the acquisition and between 75% and 80% of Blatz beer was sold through them both before and after the acquisition.[22] We also know from the record that "the vast majority" (Page 100 of Transcript) of distributors handle more than one brand of beer. Beyond that we know nothing of the nature and function of distributorships in general—their relationship to breweries they represent, their contract rights, if any, their dependence or lack of dependence upon a particular brand, the nature of competition, if any, among them, the number of distributorships and the number of Pabst and/or Blatz distributorships in existence, etc. With these glaring voids in the proof, we must hold that the plaintiff has not shown that any probable effect of the acquisition on distributors may be substantially to lessen competition or to tend to create a monopoly in the beer industry.

The facts in the *Bethlehem Steel* case, from which the plaintiff has quoted the following statement as authority for its position:

> "A horizontal merger can affect competition in at least two ways. It can have an impact not

[21] The documentary evidence established that eight distributorships were lost by consolidation after the acquisition.

[22] The record does not reveal how the remaining beer was sold.

> only on the competitors of the merged companies but also on the buyers who must rely upon the merged companies and their competitors as sources of supply" (168 F. Supp. 576, at Page 588.)

and the facts in *Crown Zellerbach,* which it cited on oral argument, do not resemble those in the case at bar, since beer distributors handle more than one brand of beer and have numerous alternate sources of supply.

Conclusion

In presenting its case, the plaintiff has deliberately chosen to rely on documentary, primarily statistical, evidence and, to a very minor extent, on excerpts from depositions. It has failed completely to present any information, other than statistics, concerning the structure, history and probable future of the market which would, in the words of *Brown Shoe* "provide the appropriate setting for judging the probable anti-competitive effect of the merger." (370 U.S. 294, at Page 322.) It has offered no testimony from either economists or experts in the beer industry in support of its position as to the relevant geographic market. It has failed to produce a single brewer, maltster, or distributor, or any person knowledgeable in this industry, in support of its position that the effect of Pabst's acquisition of Blatz may be that proscribed by § 7. Under these circumstances, and for the reasons heretofore set forth, we must hold that the plaintiff has shown no right to relief. The motion of the defendant Pabst for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure must therefore be granted.

Counsel for the defendant, Pabst, will prepare findings of fact and conclusions of law pursuant to this Opinion, and submit them to counsel for the plaintiff for approval as to form.

Dated, Milwaukee, Wisconsin, this 22d day of September 1964.

ROBERT E. TEHAN,
U.S. District Judge.

APPENDIX B

United States District Court, Eastern District of Wisconsin

Civil Action No. 59 C 215

(Filed October 13, 1964)

UNITED STATES OF AMERICA, PLAINTIFF

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PABST BREWING COMPANY FOLLOWING OPINION OF SEPTEMBER 22, 1964

JOHN T. CHADWELL,
GLENN W. MCGEE,
DAVID A. NELSON,
135 South LaSalle Street,
Chicago, Illinois, 60603.
RAY T. MCCANN,
152 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.

Of Counsel:
CHADWELL, KECK, KAYSER, RUGGLES & MCLAREN,
135 South LaSalle Street, Chicago, Illinois, 60603.

Dated: October 9, 1964.

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PABST BREWING COMPANY FOLLOWING OPINION OF SEPTEMBER 22, 1964

Table of Contents

	Page
Finding of fact	1
I. Jurisdictional matters; this litigation	1
A. The parties, the acquisition, and the issues	1
B. Pretrial occurrences	4
C. The trial	6
D. Pabst and Blatz	6
II. The plaintiff has not satisfied its burden of proving that Wisconsin or the three-State area is a relevant geographic market	9
A. Wisconsin	9
B. The three-State area	19
III. The plaintiff has not satisfied its burden of proving that the effect of the acquisition of Blatz by Pabst may be substantially to lessen competition or to tend to create a monopoly in the beer industry in the continental United States, the only relevant geographic market	21
A. Market shares and trend toward concentration	21
B. Vertical effects of the acquisition on maltsters	28
C. Vertical effects of the acquisition on distributors	29
D. Summary	30
Conclusions of law	32

United States District Court, Eastern District of Wisconsin

Civil Action No. 59 C 215

UNITED STATES OF AMERICA, PLAINTIFF

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PABST BREWING COMPANY FOLLOWING OPINION OF SEPTEMBER 22, 1964

I. JURISDICTIONAL MATTERS; THIS LITIGATION

A. *The Parties, the Acquisition, and the Issues*

1. Defendant Pabst Brewing Company (hereinafter referred to as "Pabst") [1] is a corporation organized and existing under the laws of Delaware (Answer, paragraph 3).

2. Defendant Schenley Industries, Inc. (hereinafter referred to as "Schenley") is a corporation organized and existing under the laws of Delaware (Answer, paragraph 4). Prior to July 30, 1958 Schenley wholly owned a subsidiary known as Blatz Brewing Company (hereinafter referred to as "Blatz"). Subsequent to July 30, 1958 the name of this subsidiary

[1] The words "Pabst" and "Blatz" are used generally to describe only the companies, but the words also describe the brands of beer sold by the companies and are sometimes used in that sense.

was changed to Val Corporation (Answer, paragraph 6).

3. On or about July 30, 1958, Pabst acquired the assets and business of Blatz Brewing Company for $11,000,000 in cash (plus adjustments for Blatz profits from May 31 to July 31, 1958), $3,500,000 in debentures, 200,000 shares of its common capital stock and common stock purchase warrants for an additional 350,000 shares of such stock (Answer, paragraph 19). Thereafter, Pabst Sales Company, a wholly-owned subsidiary of Pabst, amended its corporate charter, changed its name to Blatz Brewing Company, and on February 27, 1959 was merged into Pabst (Answer, paragraph 6).

4. The complaint was filed by plaintiff, the United States of America, October 1, 1959 and alleged that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in three areas, the United States, the state of Wisconsin, and the three-state area of Wisconsin, Illinois and Michigan, in violation of Section 7 of the Clayton Act (Complaint, paragraph 19). The court was asked to adjudge the acquisition illegal and order Pabst to divest the business and assets of Blatz (Complaint, Prayer for Relief, paragraphs 1 and 2). On May 9, 1960 plaintiff filed a motion for a preliminary injunction which was settled by an agreed order of June 6, 1960.

5. An intensive pretrial program produced considerable agreement among the parties. Prior to the time of trial, it was agreed that the only line of commerce involved is the beer industry, i.e., the production, distribution and sale of beer, and that it did not include the production, sale or distribution of the ingredients of beer nor any sale or distribution

of draft or packaged beer as a separate line of commerce (Orders Following Pretrial Conferences of January 15, 1962 and October 12, 1962). Jurisdiction and venue were admitted by Pabst, as was the fact that both Pabst and Blatz sold beer in interstate commerce prior to the acquisition and Pabst continued to do so thereafter (Answer, paragraphs 1, 2, 8 and 9). The parties had also agreed that the continental United States [2] as a whole was a relevant section of the country.

6. Several issues remained, however. Pabst denied that the state of Wisconsin or the three-state area of Illinois, Wisconsin and Michigan was a relevant section of the country as that term is used in Section 7 of the Clayton Act (Answer, paragraphs 13, 14, 16 and 19). Issue was likewise joined as to whether the acquisition might substantially lessen competition or tend to monopoly in any of the alleged sections of the country. Pabst denied all plaintiff's allegations as to probable anti-competitive effects of the acquisition in any of the areas advanced by the plaintiff as relevant (Answer, paragraph 19), alleging rather that the acquisition's purpose was to avoid the consequences of Pabst's declining sales and increasing losses [3] and its effect was to preserve and promote competition in the beer industry (Answer, paragraph 19).

7. Plaintiff thus had the burden of proving at the trial its allegations that Wisconsin and the three-state

---

[2] As used herein the "continental United States" or "United States" or "country as a whole" refers to the forty-eight states and the District of Columbia excluding Alaska and Hawaii. Likewise, the general term "state" includes the District of Columbia but excludes Alaska and Hawaii.

[3] Plaintiff's motion to strike this failing enterprise defense contending that the defense was available only to an acquired firm was denied by this court's order of March 31, 1961.

area of Wisconsin, Illinois and Michigan each is a section of the country within which the effects of the acquisition are to be examined; and that, within the continental United States, and, if it sustained its burden of proving Wisconsin or the three-state area a relevant geographic market, within one or both of these areas, the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the beer industry.

B. *Pretrial Occurrences*

8. After issue was joined, numerous pretrial conferences were held to expedite discovery and prepare this case for trial on the contested issues. It was determined that liability would be decided before any hearing on the type of relief, if any, to be afforded (See Memorandum Decision dated April 7, 1960, page 3). Pursuant to pretrial procedures, plaintiffs and Pabst each disclosed to the other party its theory of the case, the documents on which it intended to rely during the trial of the case, the names of the witnesses who would be called, and the nature of the testimony to be expected from each witness. Plaintiff revealed that its representatives had interviewed 208 brewers, 164 distributors and 32 maltsters of whom 71 were listed as witnesses who would testify for plaintiff and who would produce documents at the trial which might be introduced in evidence (Plaintiff's Further Response to Pretrial Order filed January 10, 1962). During the summer of 1962, pretrial subpoenas duces tecum were issued to these 71 witnesses: 39 brewers, 24 distributors and 8 maltsters. Pursuant to these subpoenas, documents concerning the purchase and sale of beer and malt by nearly all of these witnesses, or affidavits in lieu thereof, were made available for

examination by both plaintiff's and Pabst's counsel in Milwaukee (Agreed Order entered April 4, 1962).

9. Based in part on plaintiff's expressed intention to call 71 witnesses, it was estimated that the trial would require approximately two months; and, despite the fact that trial was twice rescheduled between the original pretrial order of May 7, 1963 setting the case for trial on October 14, 1963 and the final trial date of January 27, 1964, no change was made in the time of trial estimate nor in plaintiff's statement of intention to call 71 witnesses.

10. On January 3, 1964, plaintiff and Pabst each petitioned for and was granted authority to issue subpoenas to witnesses residing more than 100 miles from Milwaukee and outside this district. In the plaintiff's motion requesting such order and its pretrial brief filed on January 13, 1964, plaintiff's counsel stated that these witnesses possessed evidence which was material to the issues, and that their testimony was necessary to establish the allegations of the complaint. The court was exhorted to pay close attention to such witnesses at the trial because of their intimate knowledge of actual competitive conditions in the industry and these witnesses were further characterized as the best source of help for the court in predicting the future of the industry resulting from the merger which must necessarily be done in Section 7 cases (Plaintiff's Motion for Subpoenas filed January 3, 1964; Plaintiff's Pretrial Brief filed January 13, 1964, pp. 27–28).

11. At the final pretrial conference on January 13, 1964, plaintiff's counsel reaffirmed its intention to call witnesses and agreed to furnish a weekly list of witnesses and the order of their expected appearance by Wednesday of the preceding week. The order respecting this agreement was received and signed

by the court on January 20, 1964, but on January 23, 1964, two court days before trial was to commence the court received a letter from the counsel for the plaintiff dated January 22, 1964 stating that the plaintiff would call no witnesses at all at the trial.

C. *The Trial*

12. The trial began on January 27, 1964 at 10:45 A.M., with opening statements. At approximately 2:30 P.M., the plaintiff began presenting its case, that is, offering exhibits and reading portions of depositions. It rested at about 3:45 P.M. the following day, after offering some 260 exhibits with little or no explanation of the meaning or significance of such exhibits by counsel and without calling a single witness, brewer, maltster, or distributor, or any other witness, to assist the court or to interpret or explain the exhibits and portions of depositions offered in evidence. The defendant Pabst immediately filed a motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Briefs with respect to that motion were filed, a hearing was held on April 30, 1964, and proposed findings and comments thereon were also filed prior to the court's opinion of September 22, 1964.

D. *Pabst and Blatz*

13. At the time of the acquisition of Blatz in 1958, and continuing to date, Pabst has owned and operated breweries located in Milwaukee, Wisconsin; Peoria, Illinois; Newark, New Jersey; and Los Angeles, California (Answer, paragraph 8). The Milwaukee brewery was the largest and had the greatest capacity (GX 108). Prior to the acquisition, Blatz Brewing Company produced beer at its single plant located in Milwaukee, Wisconsin (Answer, paragraph 9).

Early in 1959, the Blatz plant was placed in a shut-down status, but Blatz brand beer has since been brewed separately at the four Pabst plants (GX 109–110).

14. In every year from 1949 to 1961 beer brewed by Pabst has been sold in every state in the continental United States (JX 47–59). Beer brewed by Blatz in Milwaukee was sold in every state in 1949, 1950, 1951 and 1953, in not less than thirty-seven states in each year from 1954 to 1957, and in forty states in 1958 (JX 47–56). In 1959 and 1960 Blatz beer was sold in every state (JX 57–58) and in 1952 and 1961 Blatz was sold in every state except one (JX 50, 59).

15. Total sales of Pabst beer and Blatz beer in the United States in the years from 1949 to 1961 were as follows:

Year	Pabst	Blatz
1949	[1] $4,336,378	$1,545,622
1950	3,763,395	1,650,071
1951	3,901,571	1,665,281
1952	4,076,816	1,551,523
1953	3,925,757	989,288
1954	3,263,033	923,583
1955	3,129,452	907,836
1956	3,017,552	937,241
1957	2,548,452	1,239,334
1958	2,254,001	1,717,489
1959	2,060,775	2,133,546
1960	1,952,130	2,426,440
1961	2,067,346	2,524,716

[1] Unless otherwise stated, industry statistics are in barrels, the volume unit most commonly used in the brewing industry.

Source: JX 47–59.

16. The percentage of national taxpaid withdrawals represented by Pabst, by Blatz, and by Pabst and Blatz combined in the years from 1949 to 1961 as well as their respective ranking among brewers in the continental United States in the years from 1957 to 1961 were as follows:

Year	Pabst		Blatz		Combined	
	Percent	Rank	Percent	Rank	Percent	Rank
1949	5.14	----	1.83	----	6.97	----
1950	4.55	----	2.00	----	6.55	----
1951	4.67	----	1.99	----	6.66	----
1952	4.81	----	1.83	----	6.64	----
1953	4.57	----	1.15	----	5.72	----
1954	3.92	----	1.11	----	5.03	----
1955	3.69	----	1.07	----	4.75	----
1956	3.55	----	1.10	----	4.66	----
1957	3.02	10	1.47	18	4.49	----
1958	2.67	11	2.04	13	4.71	----
1959	2.35	13	2.44	11	4.79	6
1960	2.22	13	2.76	9	4.98	6
1961	3.00	10	2.83	11	5.83	3

Source: JX 6-11, JX 32, 35, 38, 41, 44, 47-59.

II. THE PLAINTIFF HAS NOT SATISFIED ITS BURDEN OF PROVING THAT WISCONSIN OR THE THREE-STATE AREA IS A RELEVANT GEOGRAPHIC MARKET

A. *Wisconsin*

17. Plaintiff failed to provide the court with the testimony of a single representative of the beer industry to explain how or why the state of Wisconsin constitutes a single area of effective competition although twelve Wisconsin brewers appeared on the plaintiff's list of seventy-one proposed witnesses. No testimony of any participant in the beer industry such as a brewer or distributor nor of any witness of any kind was offered which might have been useful to assist the court in determining whether there exists any area of effective competition in beer other than the agreed area, the continental United States.

18. Total taxpaid withdrawals (the output of breweries on which the federal excise tax of $9.00 per barrel is paid) and production (the total output of brew-

eries) of Wisconsin breweries, Wisconsin taxpaid withdrawals and production as a percentage of national taxpaid withdrawals and production, and Wisconsin's rank among states in taxpaid withdrawals and production from 1933 to 1961 were as follows:

	Wisconsin taxpaid withdrawals			Wisconsin production		
Year	Barrels	Percent	Rank	Barrels	Percent	Rank
1933	3,039,819	14.90	2	(1)	(1)	(1)
1934	4,608,201	11.62	3	(1)	(1)	(1)
1935	4,867,456	10.85	3	5,207,777	10.91	3
1936	5,816,778	11.00	3	6,112,458	10.92	3
1937	6,053,157	10.90	3	6,338,141	10.92	3
1938	5,570,487	10.86	3	5,764,000	10.79	3
1939	5,578,603	10.60	3	5,813,166	10.56	3
1940	5,280,492	10.24	3	5,493,999	10.25	3
1941	5,975,442	10.54	3	6,345,674	10.56	3
1942	7,214,582	11.28	2	7,741,710	11.45	2
1943	8,143,833	11.31	2	8,584,909	11.46	2
1944	8,366,988	10.38	3	9,420,922	11.04	2
1945	8,423,249	10.38	3	9,445,668	10.80	3
1946	8,372,237	10.62	3	8,905,076	10.78	2
1947	10,453,449	12.02	2	11,204,452	12.25	2
1948	10,528,409	12.43	2	11,144,944	12.70	2
1949	11,448,463	13.57	1	12,281,394	13.90	1
1950	12,009,271	14.52	1	13,085,174	14.86	1
1951	12,824,119	15.33	1	14,076,966	15.73	1
1952	13,606,635	16.06	1	15,075,934	16.69	1
1953	10,749,014	12.51	2	11,567,224	12.57	2
1954	10,482,752	12.60	2	11,074,157	12.46	2
1955	10,727,842	12.63	2	11,498,019	12.75	2
1956	11,128,076	13.10	1	11,938,007	13.23	1
1957	11,014,566	13.07	2	11,735,362	13.13	2
1958	11,034,403	13.08	1	11,868,224	13.18	1
1959	10,119,075	11.56	2	10,737,424	11.54	2
1960	10,056,894	11.45	2	10,589,589	11.34	2
1961	10,383,561	11.67	2	11,198,894	11.78	2

[1] Not available.

19. Wisconsin has ranked eighth, ninth or tenth among the states in the consumption of beer in each year from 1934 to 1961. Wisconsin's consumption in barrels, Wisconsin's consumption as a percent of national consumption, and Wisconsin's rank among states in consumption from 1934 to 1961 were as follows:

Year	Barrels	Percent	Rank
1934	1,702,787	4.75	8
1935	1,906,544	4.60	8
1936	2,193,411	4.49	8
1937	2,295,973	4.40	8
1938	2,142,481	4.25	8
1939	2,174,457	4.16	8
1940	2,114,727	4.13	8
1941	2,201,172	3.86	8
1942	2,196,510	3.49	10
1943	2,425,135	3.45	9
1944	2,584,884	3.38	9
1945	2,710,444	3.40	9
1946	2,805,819	3.49	9
1947	3,039,738	3.59	10
1948	3,097,385	3.68	9
1949	3,031,060	3.66	9
1950	3,043,925	3.69	9
1951	2,945,593	3.55	9
1952	3,039,323	3.60	9
1953	3,076,497	3.61	9
1954	3,014,067	3.65	9
1955	3,099,655	3.68	9
1956	3,094,919	3.65	9
1957	3,066,673	3.66	9
1958	3,112,955	3.72	9
1959	3,198,468	3.68	9
1960	3,267,348	3.75	9
1961	3,303,154	3.73	9

Source: JX 12-21.

20. In 1939 beer was legally sold and consumed in each state in the United States for the first time since before prohibition; in each year thereafter through 1961 beer was in fact sold in every state (JX 13–21). Since 1952 no single state has consumed more than 12.83% of total national consumption (JX 18–21) or accounted for more than 16.06% of national taxpaid withdrawals (JX 7–11). The foregoing tables reveal that from 1935 to 1961 the production of beer in Wisconsin far exceeded Wisconsin consumption of beer in that state. It is obvious, therefore, that the great bulk of Wisconsin's production of beer was consumed outside that state.

21. In the years from 1955 to 1961 the Wisconsin consumer did not limit himself to Wisconsin brewed

beer, but drank freely of beers brewed by out-of-state brewers (JX 60–78, GX 257).

22. The number of brewing companies selling beer in Wisconsin and the number of breweries operated in Wisconsin in each year from 1955 to 1961 were as follows:

Year	Number of companies selling beer in Wisconsin	Number of breweries operated in Wisconsin
1955	77	43
1956	74	43
1957	69	38
1958	[1] 69	38
1959	60	38
1960	56	33
1961	54	33

[1] Pabst and Blatz treated as separate companies.

Source: JX 60-78, GX 213.

The 54 companies selling in Wisconsin in 1961 owned 132 brands (GX 257).

23. The percentage of total Wisconsin sales and the ranking of Pabst, Blatz, and Pabst and Blatz combined among all companies selling beer in Wisconsin from 1955 to 1961 were as follows:

Year	Pabst		Blatz		Pabst-Blatz	
	Rank	Percent of Wisconsin sales	Rank	Percent of Wisconsin sales	Rank	Percent of Wisconsin sales
1955	3	10.51	1	14.01	----	----
1956	4	10.86	1	12.72	----	----
1957	4	11.14	1	12.81	----	----
1958	4	10.73	1	12.99	----	----
1959	----	----	----	----	1	24.80
1960	----	----	----	----	1	26.14
1961	----	----	----	----	1	27.41

Source: JX 60-78.

24. National and Wisconsin sales of Pabst beer and Blatz beer in the years from 1949 to 1961 were as follows:

Year	Pabst		Blatz	
	National	Wisconsin	National	Wisconsin
1949	4, 338, 373	2302, 536	$1, 943, 022	$460, 626
1950	3, 763, 306	295, 203	1, 680, 071	374, 302
1951	3, 601, 571	271, 602	1, 665, 261	367, 726
1952	4, 070, 816	301, 914	1, 551, 523	337, 399
1953	3, 936, 737	283, 347	999, 203	430, 263
1954	3, 263, 052	304, 039	923, 203	427, 609
1955	3, 139, 452	324, 396	937, 526	432, 310
1956	3, 017, 352	333, 339	937, 341	399, 410
1957	2, 848, 452	340, 379	1, 339, 334	395, 678
1958	2, 284, 001	333, 344	1, 717, 469	403, 427
1959	2, 080, 775	374, 704	2, 133, 346	414, 322
1960	1, 952, 130	429, 402	2, 426, 440	424, 327
1961	2, 067, 346	473, 490	2, 324, 716	429, 772

Source: JX 47-59.

25. More Pabst brand beer was sold in California, Illinois and New York than was sold in Wisconsin in 1949 (JX 47); more Pabst brand beer was sold in California and in Illinois than was sold in Wisconsin in each of the years 1950 to 1957 (JX 48–55); more Pabst brand beer was sold in California than in Wisconsin in 1958, 1959 and 1961 (JX 56–59). Wisconsin was the largest state market for Pabst in 1960 (JX 58). From 1949 to 1957 more Blatz beer was sold in Wisconsin than any other state; in each year from 1958 to 1961 Michigan ranked first in sales of Blatz beer and Wisconsin ranked second (JX 47–59).

26. The percentage of national Pabst and Blatz sales which were made in Wisconsin in the years 1957–1961 is shown on the following table:

Year	Percent total Pabst sales which were made in Wisconsin	Percent total Blatz sales which were made in Wisconsin
1957	13.36	31.36
1958	14.76	23.49
1959	18.19	19.51
1960	22.00	17.49
1961	17.83	17.02

Source: JX 55-59.

27. In the years from 1955 through 1960 the following amounts were spent for advertising Pabst brand beer in the United States and in Wisconsin. The percentage of these total advertising expenditures made in Wisconsin and the percentage of national Pabst sales made in Wisconsin are also shown below:

Dollars Spent Advertising Pabst

Year	United States	Wisconsin	Percent of dollars spent in Wisconsin	Wisconsin percent of total national Pabst sales
1955	$7,361,270	$436,427	6.01	10.37
1956	8,430,316	537,722	6.00	11.05
1957	8,640,557	797,604	9.11	13.26
1958	6,209,602	558,751	8.65	14.78
1959	5,602,752	647,468	11.76	18.19
1960	5,726,267	779,472	13.61	22.00

Source: JX 43-48, GX 129-134.

28. In the years 1959 and 1960 the following amounts were spent for advertising Blatz brand beer in the United States and Wisconsin. The percentage of these total national advertising expenditures made in Wisconsin and the percentage of national Blatz sales made in Wisconsin are also shown below:

Dollars Spent Advertising Blatz

Year	United States	Wisconsin	Percent of dollars spent in Wisconsin	Wisconsin percent of national Blatz sales
1959	$4,153,697	$286,517	23.26	19.51
1960	5,113,205	1,001,020	19.58	17.49

Source: JX 47-48, GX 129-130.

29. There is no evidence in the record concerning the price of any type of package of Pabst or Blatz beer except the price for 24/12-oz. returnable bottles, f.o.b. brewery; neither is there any record evidence concerning the price of draft beer. The record also

lacks any evidence concerning the relative sales volume of 24/12-oz. returnable bottles and the various other packages of beer. After the acquisition the price charged distributors in Wisconsin for Blatz brand beer on packages of 24/12-oz. returnable bottles, f.o.b. brewery, was generally higher than that charged elsewhere (GX 124, 256, Tr. 106–107).

30. There is no evidence in the record that competition in the beer industry is in any manner localized (as, for example, by the factor of inconvenience) or affected by the location of a brewery or that the place of production in any manner affects sales or the extent of the market area.

31. From 1935 through 1961 the production of beer in Wisconsin far exceeded Wisconsin consumption of beer. During the years from 1957 through 1961 the number of barrels produced and consumed in Wisconsin were:

Year	Barrels produced	Barrels consumed
1957	11 735, 382	3, 066, 673
1958	11, 868, 224	3, 112, 955
1959	10, 737, 424	3, 198, 468
1960	10, 589. 589	3, 267, 348
1961	11, 198, 804	3, 303, 154

Source: JX 19-21, 29-31.

Since the Wisconsin consumer drank freely of beers brewed by out-of-state brewers, it is obvious that the great bulk of Wisconsin's production of beer was consumed outside of Wisconsin.

32. In 1958, the year of the merger, seventeen states produced no beer; nineteen others consumed more beer than they produced; in thirteen states taxpaid withdrawals exceeded consumption. The total consumption and total taxpaid withdrawals for each state in 1958 are shown on the following table:

1958

State	Consumption	Taxpaid withdrawals
Alabama	$502,512	----------
Arizona	594,270	$195,847
Arkansas	340,443	----------
California	7,002,755	6,535,083
Colorado	716,241	1,574,774
Connecticut	1,271,985	104,395
Delaware	223,003	----------
District of Columbia	475,646	----------
Florida	1,930,244	427,149
Georgia	596,663	144,537
Idaho	264,440	31,431
Illinois	5,804,309	3,043,349
Indiana	2,126,714	2,362,627
Iowa	1,237,372	54,864
Kansas	610,725	----------
Kentucky	1,073,017	1,892,895
Louisiana	1,277,324	2,243,111
Maine	423,617	----------
Maryland	1,892,262	2,116,041
Massachusetts	2,604,392	1,132,043
Michigan	5,060,694	3,914,576
Minnesota	1,730,142	3,744,515
Mississippi	310,886	----------
Missouri	2,193,944	6,885,174
Montana	412,293	254,807
Nebraska	720,265	1,011,453
Nevada	190,850	----------
New Hampshire	338,502	----------
New Jersey	3,691,77	7,314,520
New Mexico	346,095	----------
New York	10,208,451	10,731,12
North Carolina	663,508	----------
North Dakota	284,036	----------
Ohio	5,197,029	4,382,124
Oklahoma	613,115	31,959
Oregon	771,519	186,554
Pennsylvania	7,121,529	6,714,450
Rhode Island	582,965	888,147
South Carolina	390,318	----------
South Dakota	233,623	----------
Tennessee	752,763	----------
Texas	4,166,218	2,484,542
Utah	225,833	140,46
Vermont	183,554	----------
Virginia	1,276,807	183,068
Washington	1,361,388	2,631,047
West Virginia	571,501	45,581
Wisconsin	3,112,965	11,034,403
Wyoming	[1]84,115	----------
Total	93,765,828	84,356,660

Source: JX 9, 20.

33. There is no evidence that Pabst or Blatz competed or were likely to compete at the retail level through controlled outlets in any area prior to the acquisition. Rather, it appears that their sales of beer were made primarily through distributors or wholesalers (Tr. 90). There is no evidence concerning the brewers' relationship with the distributors or wholesalers. Neither is there any evidence with respect to the relations between retail beer outlets and either distributors or brewers.

34. There is no evidence concerning extraordinarily rapid population growth, large and growing cities, increasing industrial activities or growth factors which establish that Wisconsin is an unique market for beer or is to be treated differently from any other area in which beer is sold.

35. Prior to the acquisition of Blatz by Pabst in July, 1958, Pabst brand and Blatz brand beer were advertised and sold in competition with each other (JX 47–56; GX 133–134, Tr. 190) and all other brands of beer throughout the United States (Answer, paragraph 12; JX 32–37).

36. While statutes and regulations with respect to the beer industry have been enacted by every state (GX 255–256), these statutes and regulations are common to all breweries and do not make it impossible to sell beer within different states (GX 256). The fact that beer is sold throughout the United States (JX 32–100) reveals that the laws of the various states do not deter interstate competition among brewers. Every state permits the shipment of beer into that state by out-of-state brewers (GX 256). None of the regulations prevent a brewer from (1) using ingredients of his own choice in his product, (2) brewing beer by a formula of his own selection,

(3) advertising the product to the consumers, (4) selling the product for resale to beer distributors, or (5) selling wherever the brewer elects to sell. For example, between 1957 and 1961 every brewery located in Indiana had sales in Michigan (JX 81–85, GX 257) and Illinois (JX 86–90, GX 257). Not a single regulation from among all those referred to in the evidence relates solely to Wisconsin. The statutes and regulations do not vary appreciably from state to state. Thus, every state permits consumer advertising; thirty-eight states have no regulations with respect to credit between the brewer and distributor; every State permits the sale of beer in 12-ounce containers, only one prevents the use of 32-ounce containers, and only four prohibit the use of 7-ounce containers; every state permits the sale of beer with an alcoholic content of over 3.2% by weight though nine states limit the alcoholic content to this amount in certain circumstances; and some of the statutes and regulations such as those regulating trading stamps and coupons referred to in GX 140–156 also affect companies in other industries.

37. Wisconsin has a high per capita consumption of beer (GX 264) computed by dividing total Wisconsin beer consumption by total Wisconsin population, but such statistics are of little value since beer cannot be sold to the population as a whole but only to adults and are of no aid in defining a market area.

38. There is no evidence in the record that any small brewery located in Wisconsin is locally owned.

39. Plaintiff has not introduced sufficient evidence to prove that the state of Wisconsin is a relevant market area which corresponds to the commercial realities of the beer industry.

B. *The Three-State Area*

40. Plaintiff failed to provide the court with the testimony of a single representative of the beer industry or any other type of qualified witness to explain how or why the states of Wisconsin, Illinois and Michigan constitute a single area of effective competition. There is no evidence in the record to suggest that competition among brewers is so localized that the area of effective competition involving beer is this narrowly confined.

41. Plaintiff's arguments with respect to the three-state area were limited to only the year 1957 (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss dated February 24, 1964). In that year the evidence shows that 14,230,609 barrels of beer were sold in this area (JX 91–92); Pabst sales in the area were 779,234 barrels, or 5.48% of total area sales (JX 91); Blatz sales in the area were 831,527 barrels, or 5.84% of total area sales (JX 91); Blatz ranked sixth and Pabst ranked seventh in total sales among the 104 different companies which sold beer in that year in the three-state area (JX 91–92). Pabst sales in this area were 30.49% of its total national sales and Blatz sales were 66.73% of its total national sales (JX 55). More than half (58%) of combined sales of Pabst and Blatz were made outside that area in 1957 (JX 55) and if combined the two companies would have ranked second with 11.32% of the market in these three states (JX 91). No evidence for any other year nor of any other type has been referred to by plaintiff in its written or oral arguments. Such evidence not only fails to prove that the three states constitute a separate relevant geographic market, but also is of ques-

tionable relevancy in even determining the question since it is more closely related to the issue of competitive effects.

42. There is no evidence in the record which demonstrates that under the commercial realities of the beer industry the three states of Wisconsin, Illinois and Michigan form a relevant market area.

III. THE PLAINTIFF HAS NOT SATISFIED ITS BURDEN OF PROVING THAT THE EFFECT OF THE ACQUISITION OF BLATZ BY PABST MAY BE SUBSTANTIALLY TO LESSEN COMPETITION OR TO TEND TO CREATE A MONOPOLY IN THE BEER INDUSTRY IN THE CONTINENTAL UNITED STATES, THE ONLY RELEVANT GEOGRAPHIC MARKET

A. *Market Shares and Trend Toward Concentration*

43. Plaintiff has failed to call as a witness a single representative of the beer industry or any other qualified person to testify as to the probable effect of the acquisition of Blatz by Pabst upon the production, distribution, and sale of beer in the United States. No evidence, other than statistics, was offered by plaintiff as to the "structure, history and probable future" of the beer industry. *Brown Shoe Company* v. *United States*, 370 U.S. 294, 322 (1962).

44. The production of beer in the United States on a commercial scale was reinstituted on April 7, 1933 following enactment of the Cullen-Harrison Act ending a fourteen year era of nationwide prohibition (Answer, paragraph 7). In the calendar year 1935, beer production amounted to 47,735,901 barrels (JX 22); taxpaid withdrawals were 44,867,639 barrels (JX 1); and consumption was 41,476,658 barrels (JX 12). These figures increased appreciably by 1939; by 1947

the 1935 consumption figures were doubled; these 1947 levels were not again reached until 1959; since 1958 there have been annual increases in these figures; all of which is shown by the following table:

Year	Production	Taxpaid withdrawals	Consumption
1933	(1)	20,400,295	(1)
1934	(1)	39,654,720	35,862,145
1935	47,735,901	44,867,639	41,476,658
1936	55,995,770	52,888,374	48,928,871
1937	58,037,759	55,539,608	52,193,605
1938	53,417,250	51,272,416	50,385,365
1939	55,041,506	52,647,505	52,308,044
1940	53,592,917	51,555,845	51,244,274
1941	59,914,907	56,698,728	56,971,239
1942	67,632,964	63,958,243	62,967,617
1943	74,921,734	72,008,677	70,367,841
1944	83,349,858	79,105,722	78,490,083
1945	87,467,024	81,144,514	79,753,605
1946	82,583,953	78,800,741	80,385,654
1947	91,489,645	86,936,712	85,194,329
1948	87,722,911	84,674,868	84,060,779
1949	88,373,356	84,351,931	82,845,503
1950	88,071,702	82,705,004	82,536,196
1951	89,512,210	83,630,785	83,085,112
1952	90,383,397	84,733,856	84,443,077
1953	92,029,707	85,945,471	85,237,866
1954	88,852,470	83,214,536	82,475,465
1955	90,213,599	84,907,946	84,257,184
1956	90,265,394	84,944,741	84,771,105
1957	89,382,923	84,288,880	83,779,609
1958	90,043,417	84,356,660	83,765,828
1959	93,068,154	87,558,974	86,875,846
1960	93,354,041	87,856,534	87,184,444
1961	94,972,948	88,976,417	88,485,795

[1] Not available

Source: JX 1-31.

45. All brewing firms selling more than 1% of sales in the United States in any year from 1957 to 1961, their sales, percentage share of national market and rank are shown below:

1957

Brewery	Barrels	Percent	Rank
Anheuser-Busch	6,115,000	7.25	1
Schlitz	6,023,000	7.15	2
Falstaff	4,300,000	5.10	3
Ballantine	3,981,000	4.72	4
Hamm	3,376,000	4.01	5
Carling	3,150,000	3.74	6
Liebmann	2,966,000	3.52	7
Schaefer	2,940,000	3.49	8
Stroh	2,583,000	3.06	9
Pabst	2,548,452	3.02	10
Miller	2,322,000	2.75	11
Lucky Lager	1,966,000	2.33	12
Schmidt	1,757,000	2.08	13
Ruppert	1,540,000	1.83	14
Piel	1,435,000	1.70	15
Drewry	1,371,000	1.63	16
National	1,301,000	1.54	17
Blatz	1,239,334	1.47	18
Coors	1,146,000	1.36	19
Jackson	1,107,000	1.31	20
Olympia	1,100,000	1.31	21
Duquesne	1,061,000	1.26	22
San Francisco	974,000	1.16	23
Pearl	943,000	1.12	24
Pfeiffer	911,411	1.08	25
Narragansett	881,000	1.05	26
International	843,554	1.00	27

1958

Brewery	Barrels	Percent	Rank
Anheuser-Busch	6,982,022	8.28	1
Schlitz	5,875,000	6.96	2
Falstaff	4,550,000	5.39	3
Ballantine	4,035,529	4.78	4
Carling	3,531,182	4.19	5
Hamm	3,394,206	4.02	6
Schaefer	2,970,000	3.52	7
Liebmann	2,850,000	3.38	8
Lucky Lager	2,361,540	2.80	9
Miller	2,312,701	2.74	10
Pabst	2,254,001	2.67	11
Stroh	1,922,872	2.28	12
Blatz	1,717,489	2.04	13
Schmidt	1,660,909	1.97	14
Drewry	1,527,304	1.81	15
Ruppert	1,450,000	1.72	16
Piel	1,420,000	1.68	17
Coors	1,406,000	1.67	18
National	1,294,000	1.53	19
Olympia	1,249,200	1.48	20
Duquesne	1,035,000	1.23	21
Jackson	1,030,351	12.2	22
Pearl	981,339	11.6	23
Burgermeister	965,500	1.14	24
Narragansett	888,000	1.05	25
Pfeiffer	844,623	1.00	26

1959

Brewery	Barrels	Percent	Rank
Anheuser-Busch	8,027,000	9.17	1
Schlitz	5,860,000	6.69	2
Falstaff	4,868,000	5.56	3
Carling	4,307,000	4.92	4
Ballantine	4,225,000	4.83	5
Pabst-Blatz [1]	4,194,321	4.79	6
Hamm	3,670,000	4.19	7
Schaefer	3,026,000	3.46	8
Liebmann	2,785,000	3.18	9
Miller	2,379,000	2.72	10
Lucky Lager	2 243,000	2.56	11
Stroh	2,112,000	2.41	12
Schmidt	1,744,000	1.99	13
Coors	1,647,840	1.88	14
Drewry	1,625,750	1.86	15
Ruppert	1,490,000	1.70	16
Piel	1,460,000	1.67	17
National	1,342,000	1.53	18
Olympia	1,335,000	1.52	19
Duquesne	1,097.000	1.25	20
Jackson	1,025,000	1.17	21
Burgermeister	999,000	1.14	22
Pearl	979,000	1.12	23
Narragansett	939,000	1.07	24
International	927,000	1.06	25
Pfeiffer	899,826	1.03	26

1960

Brewery	Barrels	Percent	Rank
Anheuser-Busch	8,480,000	9.65	1
Schlitz	5,640,000	6.42	2
Falstaff	4,910,000	5.59	3
Carling	4,790,000	5.45	4
Ballantine	4,383,000	4.99	5
Pabst-Blatz [1]	4.378,570	4.98	6
Hamm	3,907,040	4.45	7
Schaefer	3,101,000	3.53	8
Liebmann	2,690,000	3.06	9
Miller	2,314,000	2.63	10
Lucky Lager	2.168,000	2.47	11
Stroh	2,102.000	2.39	12
Coors	1,907,000	2.17	13
Schmidt	1,811,000	2.06	14
Drewry	1.638,800	1.87	15
Olympia	1,496,895	1.70	16
Piel	1,486,000	1.69	17
National	1,355,000	1.54	18
Ruppert	1,305,000	1.49	19
Duquesne	1,067,000	1.21	20
Pearl	1,026,000	1.17	21
Jackson	1,012,000	1.15	22
Narragansett	941,000	1.07	23
Burgermeister	931,000	1.06	24
International	918,000	1.04	25
Pfeiffer	917,804	1.04	26
Lone Star	895,111	1.02	27

See footnotes at end of table.

1961

Brewery	Barrels	Percent	Rank
Anheuser-Busch	8,800,000	9.55	1
Schlitz	5,775,688	6.49	2
Pabst-Blatz [3]	5,192,662	5.83	3
Falstaff	5,120,000	5.75	4
Carling	5,047,328	5.67	5
Ballantine	4,510,000	5.06	6
Hamm	3,714,144	4.17	7
Schaefer	3,286,550	3.69	8
Liebmann	2,987,146	3.35	9
Miller	2,708,804	3.04	10
Coors	2,303,000	2.59	11
Lucky Lager	2,238,000	2.51	12
Stroh	2,029,300	2.28	13
Schmidt	1,854,842	2.08	14
Olympia	1,558,000	1.75	15
Drewry	1,457,812	1.64	16
Pearl	1,429,068	1.60	17
National	1,375,000	1.54	18
Piel	1,360,000	1.53	19
Ruppert	1,200,000	1.35	20
Narragansett	1,094,000	1.23	21
Duquesne	1,007,201	1.13	22
Jackson	964,100	1.08	23
Pfeifer	930,073	1.04	24
Lone Star	901,505	1.01	25

[1] Pabst sales were 2,060,775 barrels in 1960 and Blatz sales were 2,135,546 barrels. Blatz would have ranked 11th with 2.44% and Pabst 13th with 2.35%.

[2] Pabst sales were 1,952,130 barrels in 1960 and Blatz sales were 2,426,440 barrels. Blatz would have ranked 9th with 2.76% and Pabst 13th with 2.22%.

[3] Pabst sales were 2,667,346 barrels in 1961 and Blatz sales were 2,524,716 barrels. Pabst would have ranked 10th with 3.00% and Blatz 11th with 2.88%.

Source: JX 33-46.

46. The combined market share of Pabst and Blatz brands for the years 1957 to 1960 was less than the 5.14% share of Pabst alone in 1949 (JX 6, JX 47) and the combined market share for Pabst and Blatz in 1961 was but 5.83% (JX 44). The combined market share of Pabst and Blatz is not of sufficient significance to infer a probability of a substantial lessening of competition or tendency to monopoly and thus shift to Pabst the burden of proving the absence of anticompetitive effects as in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963). The market share figures of Pabst and Blatz are not of such size that Pabst and Blatz can be characterized

as major competitive factors comparable to the consolidating banks in *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

47. The number of brewing companies selling beer in the United States and those selling over 5%, 4% and 1% of national taxpaid withdrawals in the years from 1957 to 1961 were as follows:

Year	Total selling	Number selling over 5 percent	Number selling over 4 percent	Number selling over 1 percent
1957	208	3	5	27
1958	191	3	6	26
1959	177	3	7	26
1960	171	4	7	27
1961	162	6	7	24

Source: JX 33-46.

48. The number of brewery premises operated in the United States in various years since 1933 is shown on the following table:

Year	Number	Year	Number
1934	714	1957	284
1935	750	1958	252
1939	653	1959	244
1943	468	1960	229
1949	440	1961	229

Source: GX 212, 213.

In its complaint (Paragraph 7) plaintiff alleged that the decrease in the number of breweries was due to "merger, consolidation, and natural attrition," but no evidence of any kind was offered by the plaintiff as to any reason for the decrease in number of breweries or as to whether the decrease was accounted for by mergers or acquisitions or as to why any brewery may have ceased operations. There is no evidence in the record of any merger or acquisition in the beer industry other than the acquistion of Blatz by Pabst.

49. The percentage of national sales represented by

the leading members of the brewing industry in the years from 1957 to 1961 was as follows:

Year	Industry leader	Top 2 firms	Top 3 firms	Top 4 firms	Top 10 firms	Top 25 firms
1957	7.25	14.40	19.30	24.22	45.08	68.99
1958	8.28	15.24	20.63	25.41	46.08	70.71
1959	9.17	15.98	21.42	26.34	49.81	73.44
1960	9.65	16.07	21.66	27.11	50.75	74.53
1961	9.83	16.04	21.87	27.62	52.60	76.90

Source: JX 35-66.

In 1948 the ten and twenty-five leading breweries in the United States accounted for 32.68% and 49.2%, respectively, of national taxpaid withdrawals (GX 210, 211). No evidence was introduced to explain the relevancy or significance as measures of concentration of figures introduced by the plaintiff concerning the shares of industry sales in the United States which were made by the top ten or the top twenty-five brewers.

B. *Vertical Effects of the Acquisition on Maltsters*

50. Plaintiff failed to provide the court with the testimony of a single representative of the malt industry or any other qualified witness to explain how the acquisition of Blatz by Pabst would affect competition in any alleged relevant market, or what effect the acquisition might have on competition in malt. Plaintiff failed to introduce into evidence any of the eight affidavits in its possession showing the production and sale of malt by eight independent malting companies even though the authenticity or genuineness of these affidavits was stipulated to by the parties in the form of an agreed order (Order entered May 29, 1962).

51. Nothing in the record tends to prove the plaintiff's allegations that Pabst's malt capacity prior to the acquisition exceeded its own needs, or that since

the acquisition Blatz brand beer has contained only Pabst produced malt. Neither is there any proof that the acquistion harmed independent breweries by depriving them of a potential source of supply for malt from Pabst's malt producing facilities.

52. Plaintiff offered no evidence of total malt industry sales in any year, total malt sales to the brewing industry in any year or of malt sales to any person, firm or corporation other than Pabst and Blatz. Nor was evidence offered of the total amount of sales by maltsters who sold to Pabst or Blatz or the reasons for any changes, if any, in malt purchases by Pabst after the acquisition of Blatz. Further, there was no evidence defining the malt industry or the nature of competition therein or which reveals that there is benefit to a brewer in being integrated as to its supply of malt even if integration be shown. There is no evidence that Blatz sold malt to third parties or purchased beer from third parties prior to its acquisition by Pabst.

53. Purchases of malt by Pabst increased from $515,066 in 1957 to $1,768,779 in 1959 (GX 116), an increase of about $1,250,000. Pabst malt purchases in 1958 were $2,277,945 (GX 116). Blatz malt purchases were $2,105,845 in 1957 and $1,609,037 in 1958 (GX 117). Seven companies sold malt to Blatz in 1957 and eight in 1958 (GX 117). Blatz did not make more than 25% of the dollar value of its malt purchases from any one company in either 1957 or 1958 (GX 117). In 1959 Pabst bought malt from eleven different malting companies (GX 116) for use at each of its four plants where Blatz as well as Pabst brand was being produced (GX 110, 116). Brewing ceased at the Blatz brewery prior to February 20, 1959 (GX 109).

C. *Vertical Effects of the Acquisition on Distributors*

54. Plaintiff did not call a single beer distributor witness to aid the court in determining what effect, if any, the acquisition of Blatz by Pabst has had, or in reasonable probability will have, upon the sale or distribution of beer in any alleged relevant market. The evidence offered concerning distributors related only to nine out of 600 to 900 Pabst brand distributors (Tr. 95–96) and an unknown number of Blatz distributors. These nine distributors were located in the cities of Chicago, Illinois; Battle Creek, Bay City, and Lansing, Michigan; and Durham, Fayetteville, and Wilmington, North Carolina (GX 137, 157–185).

55. The record contains no evidence concerning the nature and function of distributorships in general—their relationship to breweries they represent, their contract rights, if any, their dependence or lack of dependence upon a particular brand, the nature of competition, if any, among them, the number of distributorships and the number of Pabst and/or Blatz distributorships in existence, etc., except as stated in Findings 54 to 57.

56. Approximately 80% of Pabst beer was sold through distributors prior to the acquisition (Tr. 90). Between 75% and 80% of Blatz beer was sold through distributors both before and after the acquisition (Tr. 90). The vast majority of distributors handle more than one brand of beer (Tr. 100). There are many alternate sources of supply for beer distributors, for example, in 1961 there were at least 162 brewing companies selling over 400 brands of beer (JX 44, GX 257).

57. Pabst did not have a policy of consolidating distributors in a single location; the company policy was to save brands, if possible, in the location where they

were established at the time of the merger and of consolidating brands, if necessary, to save a distributor or obtain new representation where previously the brand had not been represented (Tr. 96–99, 190–195, GX 267).

D. *Summary*

58. Plaintiff's evidence has consisted of documentary, primarily statistical, evidence and, to a very minor extent, excerpts from depositions. Plaintiff has failed to present any evidence, other than statistics, concerning the structure, history and probable future of the market. It has offered no testimony from either economists or experts in the beer industry in support of its position as to the relevant geographic market. It has failed to produce a single brewer, maltster, or distributor, or any person knowledgeable in this industry, in support of its position that the effect of Pabst's acquisition of Blatz may be that proscribed by Section 7.

59. Plaintiff's evidence of market shares, trend toward concentration, and vertical effects of the acquisition on distributors and maltsters does not provide the basis for concluding that the acquisition of Blatz by Pabst has had, or in all reasonable probability will have, the effect of substantially lessening competition or tending to create a monopoly in the beer industry in the United States. In sum, plaintiff has failed to sustain its burden of proving that Section 7 of the Clayton Act, 15 U.S.C. § 18, has been violated.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action and of the parties hereto pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25.

2. The only line of commerce for purposes of this case is the beer industry, i.e., the production, distribution and sale of beer.

3. The continental United States is the relevant section of the country in which the competitive effect of this acquisition must be judged.

4. Plaintiff has failed to meet its burden of proving that either Wisconsin or the combination of the three states of Wisconsin, Illinois and Michigan is a relevant section of the country within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. Plaintiff has failed to meet its burden of proving that in the continental United States the effect of the acquisition of the assets of the Blatz Brewing Company by Pabst Brewing Company may be substantially to lessen competition or to tend to create a monopoly in beer.

6. The motion of the defendant, Pabst Brewing Company, for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure must therefore be granted.

* * * * *

Respectfully submitted,

(S) JOHN T. CHADWELL,
(S) GLENN W. McGEE,
(S) RAY T. McCANN,
(S) DAVID A. NELSON,
Attorneys for Defendant, Pabst Brewing Company.

CHADWELL, KECK, KAYSER, RUGGLES & McLAREN,
135 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-2545.

RAY T. McCANN,
152 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
BRoadway 6-3565.

Of Counsel

Dated: October 9, 1964.
Approved as to form:
(S) BERTRAM M. LONG,
Attorney, Department of Justice.

Dated, Milwaukee, Wisconsin, this 13th day of October, 1964.

(S) ROBERT E. TEHAN,
U.S. District Judge.

APPENDIX C

United States District Court, Eastern District of Wisconsin

Civil Action No. 59 C 215

(Filed October 13, 1964)

UNITED STATES OF AMERICA, PLAINTIFF

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION, DEFENDANTS

FINAL JUDGMENT OF DISMISSAL

Plaintiff, the United States of America, having duly presented all its evidence in support of its complaint and having duly rested on January 28, 1964, the defendant, Pabst Brewing Company, having filed a motion for judgment of dismissal pursuant to the provisions of Rule 41(b) of the Federal Rules of Civil Procedure on the ground that, upon the facts and the law, plaintiff has shown no right to relief; briefs in opposition to and in support of the motion having been filed, and a hearing on said motion having been held, and the Court having considered the pleadings, all of the evidence in the record, the briefs, and the arguments of defendant Pabst Brewing Company and plaintiff, and being fully informed, and having on September 22, 1964 filed its Opinion with respect to said motion, and having on the date hereof filed its Findings of Fact and Conclusions of Law,

Now Therefore, it is Ordered, Adjudged, and Decreed in accordance with the aforesaid Opinion, Findings of Fact and Conclusions of Law:

1. That the motion of defendant Pabst Brewing Company for judgment of dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure is hereby granted.

2. That the complaint filed herein by the plaintiff, the United States of America, against Pabst Brewing Company, Schenley Industries, Inc. and The Val Corporation is hereby dismissed with prejudice.

Dated, Milwaukee, Wisconsin this 13 day of October 1964.

Enter:

(S) ROBERT E. TEHAN,
United States District Judge.

Approved as to form:

(S) BERTRAM M. LONG,
Attorney for Plaintiff.

(S) JOHN T. CHADWELL,
Attorney for Defendant,
Pabst Brewing Company.

U.S. GOVERNMENT PRINTING OFFICE: 1965